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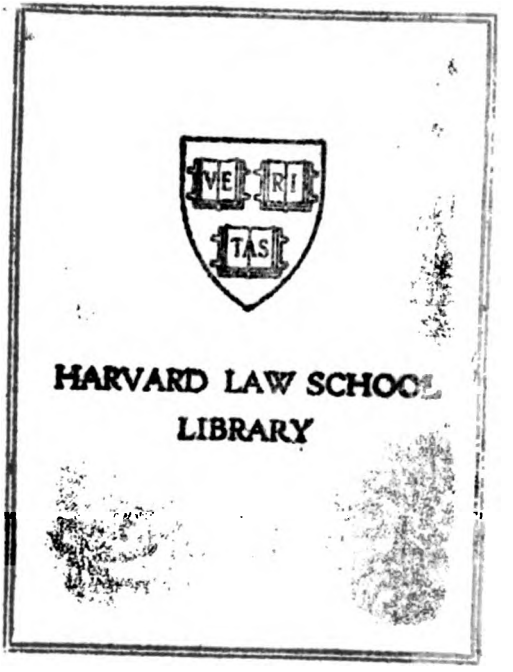

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REPORTS

CIVIL AND CRIMINAL CASES

DECIDED BY THE

COURT OF APPEALS

OF KENTUCKY.

VOLUME IX.

T. R. McBEATH, REPORTER.

VOLUME 116, KENTUCKY REPORTS,

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TABLE OF CASES REPORTED.

Alvey, &c. ads. City Louisville....812
American Steel Hoop Co. ads. Guenther....580
Anderson v. Kemper and Others....339
Arnold ads. McCormick Har. Machine Co....508
Arnold, &c. v. Eastin's Trustee, &c....686
Bach, &c. v. Roark....457
Barber Asphalt Co. &c. ads. L. & N. R. R. Co....856
Barclay v. Commonwealth....275
Baughman ads. Cin., N. O & T. P. Ry. Co....479
Beckham, Governor ads. Traynor 13
Berry ads. Wyles (Commissioner)....377
Bess v. Commonwealth....927
Board of Education City Winchester v. Foster, &c....484
Bogard v. Ill. Cent. Ry. Co....429
Brand v. Brand, &c....785
Bright, &c. ads. Swinebroad....514
Brown, &c. ads. Thompson's Exr....102
Browning v. Commonwealth. 282
Buchanan ads. Riley 625
Burkhart v. Loughridge, &c....604
Butler County v. James....575
Capital Gas & Elec. Light Co. ads. People's Elec. Light & Power Co. 76
Central Bitulithic Paving Co., &c. ads. Fineran, &c....495
Chesapeake & O. Ry. Co. ads. Commonwealth....951
Chesapeake & O. Ry. Co. ads. Davis' Admr....144
Chesapeake & O. Ry. Co. ads. Sturgill, &c....659
Cincinnati, N. O. & T. P. Ry. Co. v. Baughman....479
City Covington v. Herzog....725
City Lexington v. Gentry....528
City Lexington ads. Lowery....157
City Louisville v. Alvey, &c....812
City Louisville v. Figg....135
City Louisville ads. Maydwell &c. 885
City Louisville v. Pirtle....812
City of Louisville v. Smith....812
City Louisville v. Wehmhoff, &c....812
City Ludlow v. Peck-Williamson H. & V. Co....608
City Owensboro v. Knox's Admr. 451
City Paducah ads. Wurth 403
City West Covington ads. Ernst....850
City Winchester Board Education v. Foster, &c....484
Clark ads. Covington Saw Mill & Mfg. Co....461

Digitized by Google

Clark County Court, &c. v. Warner....801
Clay's Guardian v. Wallace....599
Columbia F. & T. Co. v. First Natl. Bank....364
Commonwealth ads. Bess....927
Commonwealth v. Chesapeake & O. Ry. Co....951
Commonwealth ads. Barclay....275
Commonwealth ads. Browning....282
Commonwealth v. Elkins....303
Commonwealth ads. Hyser....410
Commonwealth v. Leak....540
Commonwealth v. Lowe....335
Commonwealth v. McConnell....358
Commonwealth v. McGovern....212
Commonwealth v. Moren....859
Commonwealth v. Phillips....329
Commonwealth v. Roark, &c....396
Commonwealth ads. Rowsey....617
Commonwealth ads. Sims....1
Commonwealth ads. Southern Ry. in Ky....907
Commonwealth v. Wood....748
Commonwealth v. Young Men's Ch. Assn....711
Continental Ins. Co. v. Vallandingham & Gentry....287
Cornett ads. Ison, &c....92
Covington Saw Mill & Mfg. Co. v. Clark....461
Creech, &c. v. Johnson, &c....441
Cross' Admr. ads. Western Union Tel. Co....5
Culver's Admr. ads. Kelly....241
Cumberland Tel. & Tel. Co. v. Martin's Admr....554
Davidson, &c. ads. Hurst....351
Daviess County, &c. v. Goodwin....891
Daviess Gravel Road Co. ads. Robertson....913
Davis' Admr. v. Chesapeake & O. Ry. Co....144
DePauw University ads. Johnson....671
Deusch, &c. v. Questa, &c....474
Downer, &c. v. Porter, &c....422
Eastin's Trustee, &c. ads. Arnold, &c....686
Elkins ads. Com....303
Engle ads. Perry County....594
Ernst v. City West Covington....850
Fidelity & Deposit Co. of Maryland ads. Warren Dep. Bank....38
Fidelity Trust & S. V. Co. v. Walker....381
Figg ads. City Louisville....135
Figg v. L. & N. R. R. Co....135
Fineran, &c. v. Central Bit. Paving Co., &c....495
Fire & Police Tel. Co. &c. ads. Gamewell Fire Tel. Alarm Co....759

Digitized by Google

First Nat. Bank ads. Columbia Finance & Trust Co.....364
Fleming, (Commissioner) ads. Johnson.....680
Foster, &c. ads. Board Ed. City Winchester.....484
Frankfort & Cin. Ry. Co. ads Thomas.....879
Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co., &c.....759
Gentry ads. City Lexington.....528
Goodman's Admr. v. L. & N. R. R. Co.....900
Goodpaster, &c. ads. Richart.....637
Goodwin ads. Daviess County, &c. 891
Gray v. U. S. Savings & Loan Co.....967
Green County v. Shortell.....108
Grubbs ads McDowell (Sheriff).....751
Guenther v. American Steel Hoop Co.....580
Harrison County ads. Shawhan.....490
Hart County v. L. & N. R. R. Co.....186
Henderson Bridge Co. ads. Henderson County.....164
Henderson County v. Henderson Bridge Co.....164
Henderson Tob. Ex. Works v. Wheeler.....322
Herzog ads. City Covington.....725
Higgins v. Stokes, &c.....664
Hodges v. Metcalfe County Court.....524
Hogan, &c. v. Tucker, &c.....918
Hulefield ads. McInerney, Sheriff..... 28
Hunt ads. Sanderson 435
Hurst v. Davidson, &c.....351
Hurt v. L. & N. R. R. Co.....545
Hussey v. Sargent, &c.... 53
Hyser v. Com. 410
Illinois Cent. Ry. Co. ads. Bogard.....429
Illinois Cent. Ry. Co. v. Langan.....318
Ison, &c. v. Cornett..... 92
James ads. Butler County.....575
Johnson v. DePauw University.....671
Johnson v. Fleming (Commissioner).....680
Johnson, &c. ads. Creech, &c.....441
Kelly v. Culver's Admr 241
Kemper, &c. ads. Anderson.....339
Knox's Admr. ads. City Owensboro.....451
Lane, &c. ads. Mayes, &c.....566
Langan ads. Illinois Cent. Ry. Co.....318
Langden-Creasy Co. v. Trustees Owenton School Dist. 562
Lanham, &c. ads. McConathy, &c.....735
Leak ads. Com.....540
Lebus ads. Malone's Committee.....975
Loughridge, &c. ads. Burkhart.....604

Digitized by Google

Louisville Bridge Co. v. L. & N. R. R. Co.....258
Louisville City Nat. Bank v. Woolridge, &c.....641
Louisville & N. R. R. Co. v. Barber Asphalt Paving Co., &c.....856
Louisville & N. R. R. Co. ads. Figg.....135
Louisville & N. R. R. Co. ads Goodman's Admr.....900
Louisville & N. R. R. Co. v. Hart County.....186
Louisville & N. R. R. Co. ads. Hurt.....545
Louisville & N. R. R. Co. ads. Louisville Bridge Co.....258
Louisville & N. R. R. Co. ads. Mills.....309
Louisville & N. R. R. Co. ads Pittsburg, C. C. & St. L. Ry. Co....258
Lowe ads. Com. 335
Lowery v. City Lexington.....157
McConathy, &c. v. Lanham, &c.....735
McConnell ads. Com. 358
McCormick Har. Machine Co. v. Arnold, &c.....508
McCullough ads. Shinkle 960
McDonald, &c. v. Stembridge's Admr.....731
McDonald, &c ads. Weisiger, &c.....862
McDowell (Sheriff) v. Grubbs.....751
McGovern ads. Com. 212
McInerney, Sheriff v. Hulefeld..... 228
McNulty, &c v. Toof, &c.....202
Malone's Committee v. Lebus.....975
Martin's Admr. ads. Cumberland Tel. & Tel. Co.....554
Maydwell, &c. v. City Louisville.....885
Mayes, &c. v. Lane, &c.....566
Maysville & B. S. Ry. Co. ads. Swice's Admr.....253
Metcalfe County Court ads. Hodges.....524
Mills v. L. & N. R. R. Co.....309
Moren v. Com. 859
Mutual Life Ins. Co. of Ky. v. O'Neil, &c.....742
O'Neil ads. Mutual Life Ins. Co. of Ky.....742
Peck-Williamson H. & V. Co. ads. City Ludlow.....608
People's Elec. Light & Power Co. v. Capital Gas & E. L. Co..... 76
Perry County v. Engle.....594
Petzold ads. Wilson, &c.....873
Phillips ads. Com. 329
Pirtle ads. City Louisville.....812
Pittsburg, C. C. & St. L. Ry. Co. v. L. & N. R. R. Co.....258
Porter, &c. ads. Downer, &c.....422
Questa, &c. ads. Deusch, &c.....474
Richart v. Goodpaster, &c.....637
Riley v. Buchanan 625
Roark v. Bach, &c. 457
Roark, &c. ads. Com. 396

Digitized by Google

Robertson v. Daviess Gravel Road Co.....913
Rowsey v. Com. 617
Sanderson v. Hunt 435
Sargent, &c. ads. Hussey 53
Scherm v. Short (Sheriff).....946
Shawhan v. Harrison County.....490
Shinkle v. McCullough.....960
Short, (Sheriff) ads. Scherm.....946
Shortell v. Green County 108
Sims v. Com. 1
Smith ads. City Louisville.....812
Southern Ry. in Ky. v. Com. 907
Stembridge's Admr. ads. McDonald, &c.....731
Stokes, &c. ads. Higgins.....664
Stum's Admr v. Stum, &c.....534
Sturgill &c. v. Chesapeake & O. Ry. Co.....659
Swice's Admr. v. Maysville & B. & S. Ry. Co.....253
Swinebroad v. Bright, &c. 514
Thomas v. Frankfort & Cin. Ry. Co.....879
Thompson's Exr. v. Brown, &c.....102
Toof and Others ads. McNulty and Others.....202
Traynor v. Beckham, Governor..... 13
Trustees Owenton School Dist. ads. Langdon-Creasy Co.....562
Tucker, &c. ads. Hogan, &c.....918
U. S. Savings & Loan Co. ads. Gray.....967
Vallandingham & Gentry ads. Continental Ins. Co.....287
Vance, &c. v. Vance's Admr.....520
Walker ads. Fidelity T. & S. Vault Co.....381
Wallace ads. Clay's Guardian.....599
Warner ads. Clark County Court, &c.....801
Warren Deposit Bank v. Fidelity &Dep. Co. of Maryland..... 38
Wehmhoff, &c. ads. City Louisville.....812
Weisiger, &c. v. McDonald, &c.....862
Western Union Tel. Co. v. Cross' Admr..... 5
Wheeler ads. Henderson Tob. Ex. Works.....322
Wilson, &c. v. Petzold 873
Wood ads. Com. 748
Wooldridge, &c. ads. Louisville City Nat. Bank.....641
Wurth v. City of Paducah.....403
Wyles (Commissioner) v. Berry.....377
Young Men's Ch. Assn. ads. Com. 711

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TABLE OF CASES CITED, EXPLAINED, &C.

IN CASES REPORTED IN THIS VOLUME.

Adams' Ex. Co. v. Crenshaw, 78 Ky., 136.....587
Alabama v. Stripling (Ala.), 21 South, 409; (36 L. R. A., 81).....843
Allen v. Hall, 77 Ky., 85.....415
Allen v. Wortham, 89 Ky., 486; (11 R., 697); (13 S. W., 73)....285
Allen v. Hall, 14 Bush, 85 207
Am. Surety Co. v. Pauley, 170 U. S., 133; (42 L. Ed., 977)..... 50
Am. Cr. Indemnity Co. v. Carrollton Fur. Mfg. Co., 36 C. C. A., 671; (95 Fed., 111) 51
Ames v. Warren, 76 Ind., 512; (40 Am. Rep., 258).....709
Archambault v. Great N. W. Tel. Co., 4 Montreal Q. B., 122.....842
Arnold v. Shields, (5 Dana, 18); (30 Am. Dec., 669).....808
Armour Packing Co. v. Brown, 76 Minn., 465.....427
Arthur v. Willins, 44 Minn., 409; (46 N. W., 851).....779
Asher v. Howard, 24 R., 2118; (70 S. W., 277); (72 S. W., 1105)..448
Ashland Coal & Iron Co. v. Wallace, 101 Ky., 626; (19 R., 849); (42 S. W., 744); (43 S. W., 207).....327
Atchison's Heirs v. Lindsey, 45 Ky., 86; (43 Am. Dec., 153)..... 74
Atty. Genl. v. Abbott, 194 Mass., 323; (28 N. E., 346).....633
Atty. Genl. v. R. R. Co., 35 Wis., 425.....233
Atty. Genl. v. Jamaica Pond Aqu. Corp., 133 Mass., 361.....232
Attala Co. v. Niles, 58 Miss., 48.....185
Auburn v. Y. M. C. A., 29 Atl., 992 (Maine).....724
Austin v. Tennessee, 179 U. S., 343; (21 Sup. Ct., 132); (45 L. Ed., 224) 848
Ball v. First Natl. Bank, 80 Ky., 501; (4 R., 400).....522
Ballard v. Thorpe (Vt.), 30 Atl., 36; (25 L. R. A., 606).....810
Baltimore, &c. R. R. Co. v. Evarts, 112 Ind., 533; (4 N. E., 369)..380
Bank v. Deveaux, 5 Cranch, 86; (36 L. Ed., 38).....151
Barfield v. Gleason, 111 Ky., 491; (23 R., 128); (63 S. W., 964) 858
Barfield v. Gleason, 111 Ky., 491; (23 R., 1102); (63 S. W., 964) 143
Barrett v. Falmouth, 109 Ky., 151; (22 R., 667); (58 S. W., 520).578
Bauman v. Boeckeler, 119 Mo., 189; (24 S. W., 207).....632
Bays v. Hunt, 60 Iowa, 251; (14 N. W., 785).....285
Beall v. Clore, 6 Bush, 677.....629
Beard v. Sharp, 23 R., 1582; (65 S. W., 810).....376
Bebell v. Foxworthy's Heirs, 9 B. Mon., 228.....250
Becker v. L. & N. R. R. Co., 110 Ky., 474; (22 R., 1893); (61 S. W., 997) 904
Bedford v. Bedford, 99 Ky., 273; (18 R., 193); (35 S. W., 926)..106

Digitized by Google

Beese v. King, 108 U. S., 379; (2 Sup. Ct., 765); (27 L. Ed., 760) 427
Bender v. McDonald, 106 Wis., 332; (82 N. W., 156) 427
Bergman & Co. v. Com. Ins. Co., 12 Ky. Law Rep., 942 302
Bernard Leas Mfg. Co. v. Waller, 18 R., 346; (36 S. W., 531) 926
Billington v. Com., 79 Ky., 400; (3 R., 19) 399
Binde v. Klinge, 30 Mo., App., 285 488
Birdsall v. Clark (N. Y.), 29 Am. Rep., 105 133
Bisenthall v. Williams, 62 Ky., 331; (85 Am. Dec., 629) 589
Black v. Hills, 36 Ill., 376; (87 Am. Dec., 224) 98
Blakemore v. Railway Co., 8 El. & Bl., 1035 561
Bland's Admr. v: Bland, 90 Ky., 400; (12 R., 532); (14 S. W., 423) 396
Blankman v. Vallijo, 15 Cal., 639 380
Boardman v. Lake Shore R. R. Co., 84 N. Y, 157 199
Bonta v. Read, 2 Dana, 170 107
Boske, Sheriff v. Security T. & S. V. Co., 22 R., 181; (55 S. W., 524) 958
Boswell's Lessee v. Otis, 9 How., 336; (13 L. Ed., 164) 791
Bowers v. Suffolk, &c. Co., 4 Cush., 332 633
Bowman v. Hilton, 11 Ohio, 303 884
Bradley v. Gilbert, 155 Ill., 154; (39 N. E., 593) 185
Brantley v. Wolf, 60 Miss., 433 100
Brannin v. Sherley, 91 Ky., 450; (12 R., 977); (16 S. W., 94) ... 346
Breckinridge v. McRoberts, 20 R., 699; (47 S. W., 454) 745
Brent v. Washington Bank, 1 Pet., 596; (9 L. Ed., 547) 798
Bright's Exrs. v. Swinebroad, 21 R., 369; (51 S. W., 578) 519
Brinck v. Collier, 56 Mo., 164 632
Brock v. Dwelling House Ins. Co., 102 Mich., 583; (61 N. W., 67) 302
Brown v. Com., 100 Ky., 127; 18 R., 630); (37 S. W., 496) 420
Bruce v. Fox, 1 Dana, 447 21
Bryant v. Bennett, 22 R., 1086; (61 S. W., 1001) 603
Bryant v. W. U. Tel. Co. (C. C.), 7 Fed., 825 843
Bryan v. M. & P. R. R. Co., 74 Ky., 597 884
Buchanan v. Curtis, 25 Wis., 99; (3 Am. Rep., 23) 633
Buchanan v. Curtis, 25 Wis., 99; (3 Am. Rep., 23) 631
Buchanan v. Litchfield, 102 U. S., 278; (26 L. Ed., 138) 125
Bunn v. Winthrop, 1 Johns. Ch. (N. Y.), 329 347
Bunnell v. Bunnell, 23 R., 800, 1101; (64 S. W., 420) 980
Burbage v. Am. Nat. Bank, 95 Ga., 503; (20 S. E., 240) 589
Burch v. Blair, 19 R., 641; (41 S. W., 547) 631
Burrill v. Nahant Bank (Mass.), 35 Am. Dec., 395 133
Burnside v. Lincoln County, 86 Ky., 423; (9 R., 635); (6 S. W., 276) 836

Digitized by Google

Cahill Case, 92 Ky., 345; (13 R., 714); (18 S. W., 2).....155
Calloway v. Glenn, 105 Ky., 651; (20 R., 1447); (49 S. W., 440)..793
Campbell Co. v. BBridge Co., 112 Ky., 659; (23 R., 2056); (66 S. W., 526) 185
Campbell Co. v. Comrs., 19 R., 860; (42 S. W., 111)..... 37
Campbell v. N. C. Bridge Co., 22 R., 2056; (66 S. W., 526)..... 36
Carr v. Clough, 59 Am. Dec., 345.....100
Carroll Co. v. Smith, 111 U. S., 556; (4 Sup. Ct., 539); (28 L. Ed., 517) 126
Carpenter v. Gresham, 59 Mo., 251.....185
Carpenter v. Laswell, 23 R., 686; (63 S. W., 609).....585
Carter v. City Portland, 4 Ore., 339.....633
Castleman v. Holmes, 4 J. J. Mar., 5.....780
Caye v. Pool's Assignee, 108 Ky., 124; (21 R., 1600); (55 S. W., 887); (49 L. R. A., 251).....884, 911
Chapman v. Rockford Ins. Co., 89 Wis., 572; (62 N. W., 422)....302
Chapline v. Moore, 23 Ky., 175..... 69
Chalmers v. Hack, 19 Me., 124.....589
Chambers v. Bap. Ed. Society, 1 B. Mon., 215.....720
Cheek v. Com., 79 Ky., 359; (2 R., 339).....846
Chenoweth v. Ins. Co., 12 R., 232.....302
Chevallier v Straham, 47 Am. Dec., 639.....911
Chicago, &c. R. R. Co. v. Fuller, 17 Wall., 560; (21 L. Ed., 710)..830
Chiles v. Drake, 59 Ky., 146; (74 Am. Dec., 406).....415
City Covington v. Highlands Dist., 113 Ky., 612; (24 R., 433); (68 S. W., 669) 36
City Newport v. Newport Light Co., 14 R., 845; (21 S. W., 645).. 91
City Covington v. Woods, 98 Ky., 344; (17 R., 927); (33 S. W., 84) 731
City Owensboro v. Simms, 99 Ky., 49; (17 R., 1393); (34 S. W., 1085) 829, 860
City Louisville v. Com., 1 Duv., 295; (85 Am. Dec., 624).....889
City Louisville v. Sherley, 80 Ky., 71; (3 R., 566).....959
City Ludlow v. Cin. South. R. R. Co., 78 Ky., 357.....142
City Louisville v. Wehmhoff, &c., 24 R., 438; (68 S. W., 650)....819
City Ludlow v. Cin. Southern R. R. Co., 78 Ky., 357.....858
Citizens' Gas Light Co. v. Louisville Gas Co., 81 Ky., 263; (5 R., 72) 87
Citizens' Sav. Assn v. Perry County, 156 U. S., 701; (15 Sup. Ct., 550); (39 L. Ed., 585).....125
C. N. O. & T. P. R. R. Co. v. Dickerson's Admr., 102 Ky., 560; (19 R., 1817); (44 S. W., 99).....904
Clamorgan v. Lane, 9 Mo., 446..... 98
Clarkson v. Morgan's Devisees, 6 B. Mon., 447.....249
Clark v. Holmes, 7 Hurl. & N., 937.....322

Digitized by Google

Clark v. Des Moines, 19 Iowa, 199; (87 Am. Dec., 428).....409
Clark v. Louisville Water Co., 90 Ky., 515; (12 R., 309); (14 S. W., 502).....889
Cook v. Harris, 61 N. Y., 448.....633
Cooper v. Reynolds, 10 Wall., 308; (19 L. Ed., 931).....791
Coleman v. Coleman, 23 R., 1476; (65 S. W., 832)..... 69
Collins v. Henderson, 11 Bush, 74.....836
Collins v. Richart, 77 Ky., 621.....522
Colwell v. Tinker, 169 N. Y., 531; (62 N. E., 668).....439
Colyer v. Thompson & Johnson, 2 T. B. Mon., 18.....925
Com. v. Porter, 113 Ky., 575; (24 R., 364); (68 S. W., 621)..... 37
Com. v. Megibbin Co., 101 Ky., 195; (19 R., 201); (40 S. W., 694) 306
Com. v. White, 18 B. Mon., 493.....337
Com. v. Perrigo, 3 Metc., 5.....337
Com. v. Stout, 46 Ky., 249.....338
Com. v. Magoffin, 15 R., 775; (25 S. W., 599).....400
Com. v. Yarbrough, 84 Ky., 496; (8 R., 483); (2 S. W., 68).....400
Com. v. Belt, 21 R., 339; (51 S. W., 431).....400
Com. v. Godshaw, 92 Ky., 435; (13 R., 572); (17 S. W., 737)...415
Com. v. Snelling, 15 Pick., 321.....432
Com. v. Pierce, 138 Mass., 165.....470
Com. v. Avery, 77 Ky., 625; (29 Am. Rep., 429).....543
Com. v. Abney, 4 T. B. Mon., 479.....630
Com. v. Morehead, 118 Pa., 344; (12 Atl., 424).....633
Com. v. Kelly, 8 Grat., 622.....633
Com. v. Lex. Cemetery Co., 114 Ky., 165; (24 R., 924); (70 S. W., 280).....723
Com. v. Loundry Cos., 105 Ky., 259; (20 R., 1172); (49 S. W., 26) 731
Com. v. Arnold, 3 Littell, 309.....751
Com. v. Barney, 24 R., 2352; (74 S. W., 181).....751
Com. v. McPeek, 14 R., 215; (20 S. W., 220).....751
Com. v. Rhodes, 6 B. Mon., 171.....751
Com. v. Chinn, 110 Ky., 527; (22 R., 1921); (62 S. W., 685)....751
Com. v. Avery, 14 Bush, 625; (29 Am. Rep., 429).....825
Com. v. L. & N. R. R. Co., 18 R., 610; (37 S. W., 589).....826
Com. v. L. & N. R. R. Co., 80 Ky., 291; (3 R., 788); (44 Am. Rep., 475) 826
Com. v. Sherman, 85 Ky., 686; (9 R., 218); (4 S. W., 790).....826
Com. v. Bailey, 81 Ky., 395; (3 R., 110).....836
Com. v. Brown, 91 Va., 762; (21 S. E., 357); (28 L. R. A., 110)..837
Com. v. Western Union Tel Co., 112 Ky., 355; (23 R., 1633); (67 S. W., 59); (57 L. R. A., 614).....839
Com. v. Leak, 116 Ky., 540; (25 R., 761); (76 S. W., 368).....844

Digitized by Google

Com. v. Simonds, 79 Ky., 618; (3 R., 380).....845
Com. v. Wickersham, 99 Ky., 21; (17 R., 1317); (34 S. W., 707)..861
Com. v. Hunter, 19 R., 109; (41 S. W., 284).....861
Combs v. Sewall, 23 R., 169; (60 S. W., 169).....808
Conley v. Com., 98 Ky., 125; (17 R., 678); (32 S. W., 285).....415
Conroy v. Vulcan Iron Works, 62 Mo., 39.....322
Cope v. Vallette Dry Dock (D. C.), 10 Fed., 142.....708
Cosby v. Ferguson, 3 J. J. Mar., 264.....393
Conwill v. Atwood, 2 Ind., 289.....589
Cothran W. U. Tel. Co., 83 Ga., 25; (9 S. E., 826.....843
Coulter, Auditor v. Denny, 23 R., 1619; (67 S. W., 65)..... 4
Covington Drawbridge Co. v. Shepherd, 20 How., 227; (15 L. Ed., 896) 151
Covington v. Whayne, 22 R., 826; (58 S. W., 776).....958
Craft v. Snooks' Exr., 13 N. J. Eq., 121; (78 Am. Dec., 94)..... 68
Craig v. Van Bibber, 18 Am. St. Rep., 657, 703..... 98
Crentz v. Hail, 89 Ky., 429; (11 R., 652); (12 S. W., 926).....971
Crigler v. Connor, 10 R., 957; (11 S. W., 202).....758
Crossdale v. City Cynthiana, 21 R., 36; (50 S. W., 977).....731
Cromie's Heirs v. Lou. Or. Home Society, 3 Bush, 365.....678
Crozier v. Young, 19 Ky., 158.....656
Cumberland Co. v. Pennell, 31 Am. Rep., 284.....683
Curling's Admr. v. Curling, &c., 8 Dana, 38; (33 Am. Dec., 475)..105
Curd v. Lewis, 1 Dana, 351.....269
Cythiana Loan & Bldg. Assn. v. Florence, 107 Ky., 636; (21 R., 1403); 55 S. W., 207).....972
Cynthiana Loan, &c. Assn. v. Eckler, 23 R., 1467; (65 S. W., 335) 973
Dannelle v. Dannelle's Admr., 67 Ky., 57..... 70
Daugherty v. Arnold, 110 Ky., 1; (22 R., 1504)..... 27
Daub v. Englebach, 109 Ill., 267.....380
Davidson's Exrs. v. Kemper, 79 Ky., 5.....394
Davis' Admr. v. C. & O. Ry. Co., 116 Ky., 144; (25 R., 342); (75 S. W., 275).....258
Debman v. Southern Bell Tel. Co., 126 N. C., 831; (36 E. E., 269) 153
Delaware Co. v. Diebold, &c. v. 133 U. S., 473; (10 Sup. Ct., 399); (33 L. Ed., 674).....380
Disbrow v. The Walsh Bros (D. C.), 36 Fed., 607.....701
District Tp. of Doon v. Cummins, 142 U. S., 366; (12 Sup. Ct., 220); (35 L. Ed., 1044).....134
Dorsey's Exr. v. Dorsey's Admr., 28 Ky., 290; (22 Am. Dec., 33).. 74
Douglass v. Cline, 75 Ky., 621.....522
Drake v. Ellman, 80 Ky., 434; (4 R., 269).....356
Dravo v. Seebolt, 17 R., 1165; (33 S. W., 1106).....396

Digitized by Google

Duff's Exr. v. Duff, 21 R., 1211; (54 S. W., 711).....355
Dunn v. Com., 105 Ky., 834; (20 R., 1649); (49 S. W., 813); (43 L. R. A., 701); (88 Am. St. Rep., 344).....209
Duncan, &c. v. Brown, 54 Ky., 186.....285
East Line Ry. Co. v. Culberson, 72 Tex., 375; (10 S. W., 706)...257
Eastern Cemetery Co. v. City Louisville, 13 R., 279; (15 S. W., 1117) 631
Ebersole v. Adams, 73 Ky., 83.....425
Edgerly v. Barker, 66 N. H., 434; (31 Atl., 900)..... 70
Edwards v. Elliott, 21 Wall., 532; (22 L. Ed., 487).....708
Elliott's Admr. v. Bush, 3 R., 466.....523
E. L. & B. S. R. R. Co. v. Combs, 10 Bush, 393.....857
E. L. & B. S. R. R. Co. v. Combs, 10 Bush, 393; (19 Am. Rep., 67) 141
Emerson v. Slater, 22 How., 28; (16 L. Ed., 360).....740
Ender's Exr. v. Tasco, 89 Ky., 17; (11 R., 592); (11 S. W., 818)..396
Erhman v. Kendrick, 1 Met., 146.....250
Eureka v. Croghan (Col.), 19 Pac., 485.....633
Ewing v. Warner, 47 Minn., 446; (50 N. W., 603).....348
Ewing v. ones, 130 Ind., 247; (29 N. C., 1057) 348
Ex parte Lacy, 24 S. E., 930; (31 L. R. A., 825); (57 Am. St. Rep., 795) 836
Ex parte Tuttle, 91 Cal., 589; (27 Pac., 933).....831
Falk v. Turner, 101 Mass., 494.....347
Fanning v. Chase, 17 R. I., 388; (22 Atl., 275); (13 L. R. A., 134): (33 Am. St. Rep., 878).....285
Farmers' & Drovers' Ins. Co. v. Curry, 13 Bush, 312; (26 Am. Rep., 194) 52
Farris v. Com., 8 R., 714; (1 S. W., 729).....624
Fisher v. Mays' Heirs, 2 Bibb, 448; (5 Am. Dec., 626).....970
Fishburn v. Chicago, 171 Ill., 338; (49 N. E., 542).....505
Fite v. Black, 92 Ga., 363; (17 S. E., 349).....380
Figg v. L. & N. R. R. Co., 116 Ky., 135; (25 R., 350) (75 S. W., 269) 856
Fletcher's Admr. v. Sanders, 37 Ky., 345; (32 Am. Dec., 96)..... 70
Flint v. Spurr, 17 B. Mon., 513.....679
Flood v. Pragroff, 79 Ky., 607; (3 R., 372).....518
Forbes & Bro. v. Cooper & Co., 88 Ky., 288; (9 R., 716); (11 S. W., 24) 783
Ford v. Ford's Exr., 91 Ky., 576; (13 R., 183); (16 S. W., 451)..721
Ford v. Kendal, &c., 121 Pa., 543; (15 Atl., 812; (1 L. R. A., 607)..854
Ford v. Ford's Exrs., 91 Ky., 572; (13 R., 183); (16 S. W., 451) 676
Franks v. Lucas, 14 Bush, 395.....758
French v. Vining, 102 Mass., 132; (3 Am. Rep., 440).....470

Digitized by Google

Freeman, &c. v. Mills, 101 Ky., 142; (19 R., 316); (39 S. W., 826) 603
Gallaher v. Moundsville, 34 W. Va., 730; (12 S. E., 859)..... 179
Garner v. Wills, 92 Ky., 386; (13 R., 726); (17 S. W., 1023)..... 394
Gardner v. Board Ed., 5 Dak., 259; (38 N. W., 433)..... 489
Garrott v. Jaffray, 73 Ky., 415..... 376
Gates v. Barrett, 79 Ky., 296; (2 R., 318)..... 958
Gatewood v. Cooper, 18 R., 869; (38 S. W., 690)..... 631
Gedge v. Com., 9 Bush, 64..... 630
Georgia R. R. Co. v. Murray (Ga.), 11 S. E., 779..... 884
George v. Bussing, 54 Ky., 558..... 653
Germania Ins. Co. v. Rudwig, 80 Ky., 223; (3 R., 712)..... 52
Gibson v. Herriott, 55 Ark., 85; (17 S. W., 589)..... 380
Gilmore v. Fox, 10 Kan., 509..... 184
Gilman v. Eastern R. R. Co., 13 Allen, 433; (9 Am. Dec., 210)... 470
Given's Admr. v. Shouse, 5 Ky. Law Rep., 419..... 678
Glass v. The Sloop, Betsey, 3 Dall., 61 R. Ed., 485..... 699
Glass v. Wilhite, 2 Dana, 170; (20 Am. Dec., 446)..... 676
Godley v. Hagerty, 59 Am. Dec., 736, (note)..... 559
Gosnell v. City Louisville, 104 Ky., 201; (20 R., 519); (46 S. W., 722) 950
Gould v. own of Sterling, 23 N. Y., 464..... 129
Granger v. Adams, 90 Ind., 87..... 709
Graves v. Saline Co., 161 U. S., 373; (16 Sup. Ct., 526); (40 L. Ed., 732) 134
Gray v. W. U. Tel. Co., 87 Ga., 350; (13 S. E., 560)..... 843
Greenup Co. v. Maysville & B. S. Ry. Co., 14 R., 699; (21 S. W., 351) 630
Grinstead v. Sanders, 22 R., 51; (56 S. W., 665)..... 917
Griffey v. Bryars, 7 Bush, 473..... 629
Green v. Canaan, 29 Conn., 157..... 633
Grotenkemper v. Bryson, &c., 79 Ky., 353; (4 R.. 888)..... 358
Grover, &c. v. Radcliffe, 137 U. S., 587; (34 L. Ed., 670)..... 585
Gruber v. Nichols, 36 Ill., 92..... 633
Guarty. Co. of North Am. v. Mechanics' Sav. Bank & Trust Co., 183 U. S., 402; (22 Sup. Ct., 124); (46 L. Ed., 253)..... 50
Gulick's Exr. v. Gulick, 25 N. J. Eq., 324..... 68
Gunn v. Gudehus, 15 B. Mon., 449..... 269
Guthrie v. New Haven, 31 Conn., 308..... 633
Hale v. Beck, 2 Eden., 229..... 68
Hale v. McLeod, 2 Metc., 104; (74 Am. Dec., 400)..... 629
Hamilton v. L. & L. & G. Ins. Co., 136 U. S., 242; (34 L. Ed., 419.. 300
Hardin Co. v. L. & N. R. R. Co., 92 Ky., 412; (14 R., 401); 17 S. W., 860)..... 196
Harrison Co. v. Seal, 66 Miss., 129; (5 South., 622)..... 633

Digitized by Google

Harmon v. Auditor, 123 Ill., 122; (13 N. E., 161).....179
Harry v. Graham, 27 Am. Dec., 450.....450
Hartranft's Appeal, 85 Pa., 433; (27 Am. Rep., 667)..... 26
Hart v. Cole (Mass), 31 N. E., 644; (16 L. R. A., 557).....559
Harp v. Com., 22 R., 1792; (61 S. W., 467).....826
Harpending's Exrs. v. Daniel, 80 Ky., 449; (4 R., 330).....745
Hauser, Brenner & Fath. Co. v. Tate & Co., 105 Ky., 701; (20 R., 1716); (49 S. W., 475).....616
Havemeyer v. Sup. Court (Cal.), 25 Pac., 433; (10 L. R. A., 646) 810
Hawes, &c. v. Orr, &c., 10 Bush, 439.....807
Healdsburg v. Mulligan (Cal.). 45 Pac., 337.....683
Heinroth v. Kockersperger, 173 Ill., 205; (50 N. E., 171).....185
Hellman v. McWilliams, 70 Cal., 449; (11 Pac., 659).....348
Henderson Bridge Co. v. Negley, 23 R., 746; (63 S. W., 989).....185
Henry v. Root, 33 N. Y., 526.....100
Hensley v. Metcalfe Co. Ct., 25 R., 204; (74 S. W., 1054).....527
Herrick v. Woolverton, 41 N. Y., 581; (1 Am. St. Rep., 461)....408
Hickman v. Brown, 88 Ky., 377; (10 R., 952); (11 S. W., 199)..656
Hicks v. Brown, 12 Johns., 142.....794
Higgins v. Stokes, 116 Ky., 664; (25 R., 919); (74 S. W., 251)..663
Hill v. City Boston, 122 Mass., 344; (23 Am. Rep., 332).....853
Hildreth v. Eliot, 81 Pick., 293.....348
Hindman v. Toney, 97 Ky., 413; (17 R., 286); (30 S. W., 1006)..809
Hiram v. Griffin, 71 Ky., 262.....655
Hobart v. City of Detroit, 17 Mich, 246.....503
Hoffert v. Miller, 86 Ky., 572; (9 R., 732); (6 S. W., 447)..... 97
Hoggins v. Becraft, 1 Dana, 31.....924
Hopper v. Town Covington, 118 U. S., 148; (30 L. Ed., 190)....126
Hopkins' Admr. v. Faeber, 86 Ky., 223; (9 R., 530); (5 S. W., 749) 518
Howard v. Worcester, 153 Mass., 426; (27 N. E., 11); (12 L. R. A., 160) 854
Howard v. Howard, 60 Vt., 362; (14 Atl., 702).....345, 347
Howard v. Gibson, 22 R., 1294; (60 S. W., 491).....477
Hughes v. Cin., &c. Ry. Co., 91 Ky., 526; (13 R., 72); (16 S. W., 275) 550
Hukell v. M. & B. S. Ry. Co. (C. C.), 72 Fed., 745.....256
Hydes v. Joyes, 4 Bush, 464; (96 Am. Dec., 311).....163
I. C. R. R. Co. v. Gholson, 23 R., 2209; 66 S. W., 1018.....553
I. C. R. R. Co. v. Scheible, 24 R., 1708; (72 S. W., 325).....314
I. C. R. R. Co. v. Coleman, 22 R., 878; (59 S. W., 13).....320
Indemnity Co. v. Wood, 19 C. C. A., 264; (73 Fed., 81)..... 51
Interstate Com. Comn. v. B. & O. R. R. Co., 145 U. S., 276; (12 Sup. Ct., 844); (36 L. Ed., 699).....912

Digitized by Google

Ingram v. Kirkpatrick, 41 N. C., 463; (51 Am. Dec., 428).....347
In re Scholtz (D. C.), 106 Fed., 834.....427
In re Worcester County, 102 Fed., 808.....427
In re Romanow (D. C.), 92 Fed., 510.....427
Inhabitants Haverhill v. Gale, 103 Mass., 104.....488
Ingles v. Straus, 91 Va., 209; (21 S. E., 490).....837
Ireland v. Mobile & O. R. R. Co., 105 Ky., 400; (20 R., 1586); (49 S. W., 453).....885
Jacobs v. Marks, 182 U. S., 591; (21 Sup. Ct., 865); (45 L. Ed., 1241).....799
Jackson v. Halloway, 53 Ky., 133.....374
Jackson v. Burchin, 14 Johns., 124..... 98
Jacobs' Admr. v. L. & N. R. R. Co., 73 Ky., 263.....415
Jermain v. Lake Shore R. R. Co., 91 N. Y., 483.....200
Jewell v. Clark, 78 Ky., 398.....460
Johnson's Admr. v. L. & N. R. R. Co., 91 Ky., 651; (10 R., 227) (25 S. W., 754).....154
Johnson v. Gwathmey, 14 Ky., 317; (14 Am. Dec., 135).....981
Jones v. Com., 20 R., 355; (46 S. W., 217).....625
Jones v. Com., 53 Ky., 2.....958
Joyes v. Jefferson Fis. Court, 106 Ky., 615; (21 R., 199); (51 S. W., 435) .....e..... 37
Justice Jefferson County v. Clark, 1 T. B. M., 86..... 21
Kansas City Milling Co. v. Riley, 133 Mo., 574; (34 S. W., 835) 632
Kendall v. United States, 12 Pet., 610; (9 L. Ed., 1181)..... 24
Kennedy v. Com., 77 Ky., 353.....624
Kennedy v. Green, 3 Myl. & K., 699.....401
Keeningham v. Keeningham's Exr., 24 R., 1330; (71 S. W., 497).. 75
Kimberlin v. Manson, &c., 23 R., 42; (62 S. W., 494).....603
Kinney v. Kinney's Exr., 86 Ky., 610; (9 R., 753); (6 S. W., 593) 678
Kitchen v. Lee, 11 Paige, 107; (42 Am. Dec., 101).....100
Knight v. Wilson, 22 R., 545; (58 S. W., 439).....745
Knopf v. Chicago Real Estate Board, 173 Ill., 196; (50 N. E. 658) 185
Krankel v. Krankel, &c., 104 Ky., 745; (20 R., 901); (47 S. W., 1084) 980
Ky. Cent. Ry. Co. v. Barrow, 89 Ky., 643; (6 R., 240).....314
Ky. Fem. Or. School v. City Louisville, 100 Ky., 470; (19 R., 1916); (36 S. W., 921).....722
Lane v. Town Woodbury, 25 Iowa, 462; (12 N. W., 478).....854
Langden-Creasy Co. v. School Dist., 116 Ky., 562; (25 R., 823); (76 S. W., 381) 958

Digitized by Google

Lary v. Cleveland, &c. R. R. Co., 78 Ind., 323; (41 Am. Rep., 572) 558
Lasch v. Stratton, 101 Ky., 672; (19 R., 889); (42 S. W 756)..321
Lathan v. Glasscock, 10 Ky. Law Rep., 77..... 973
Lee v. South. Pac. Ry. Co., 116 Cal., 97; (47 Pac., 932)..... 256
Lefferts v. Board Sup., 21 Wis., 688..... 185
Lester v. Given, 71 Ky., 357..... 376
Lewis v. Bourbon Co. Comrs., 12 Ky., 216..... 129
Lewellen v. State, 18 Texas, 538..... 543
Lexington Ry. Co. v. Fain's Admr., 24 R., 1443; (71 S. W., 628)..456
Lexington v. Rennick, 105 Ky., 779; (20 R., 1609); (49 S. W., 787); (50 S. W., 1106)..... 580
Linthecum v. Finley, 74 Ky., 131..... 426
Litz v. Gosling, 93 Ky., 185; (14 R., 91); (19 S. W., 527)..... 740
Lockwood v. Slevin, 26 Ind., 124..... 709
Loop v. Litchfield, 42 N. Y., 351; (1 Am. Rep., 513)..... 561
Los Angeles Cem. Co. v. Los Angeles (Cal.), 32 Pac., 240..... 633
Losee v. Clute, 51 N. Y., 494; (10 Am. Rep., 638)..... 561
Louisville v. Tatum, Embry & Co., 111 Ky., 747; (23 R., 1014); (64 S. W., 836)..... 565
Louisville Banking Co. v. Eiseman, 94 Ky., 83; (14 R., 705); (21 S. W., 531, 1049); (19 L. R. A., 684)..... 782
Louisville Bridge Co. v. Louisville, 23 R., 1655; (65 S. W., 815) 185
Louisville Bridge Co. v. L. & N. R. R. Co., 106 Ky., 674; (21 R., 271); (51 S. W., 185)..... 266
Louisville Gas Co. v. Kaufman, 105 Ky., 131; (20 R., 569); 48 S. W., 434)..... 781
Lou. Gas Co. v. Kaufman, Straus & Co., 105 Ky., 131; (20 R., 1069); (48 S. W., 434)..... 550
Louisville Trust Co. v. Comingor, 184 U. S., 18; (22 Sup. Ct., 293); (46 L. Ed., 413) 427
Lou. Tob. Warehouse Co. v. Com., 20 R., 1047; (48 S. W., 420)..564
L. & N. R. R. Co. v. Survant, 19 R., 1576; (44 S W., 88)..... 154
L. & N. R. R. Co. v. Survant, 96 Ky., 197; (16 R., 545); 27 S. W., 999) 154
L. & N. R. R. Co. v. Com., 4 R, 627..... 307
L. & N. R. R. v. Samuels' Exr., 22 R., 303; (57 S. W., 235)..... 314
L. & N. R. R. v. Taylor, 92 Ky., 55; (13 R., 373); (17 S. W., 198) 317
L. & N. R. R. v. Dalton, 102 Ky., 290; (19 R., 1318); (14 S. W., 431) 317
L. & N. R. R. Co. v. Bodine, 23 R., 147; (59 S. W., 742); (56 L. R. A., 506)..... 155
L. & N. R. R. Co. v. Semones, 21 R., 444; (51 S. W., 612)..... 470

Digitized by Google

L. & N. R. R. Co. v. Wathen, 22 R., 82; (49 S. W., 185).....550
L. & N. R. R. Co. v. Smith's Exr., 87 Ky., 501; (10 R., 514); (9 S. W., 493).....734
L. & N. R. R. Co. v. Cooper, 19 R., 1152; (42 S. W., 1134).....884
L. & N. R. R. Co. v. Tarter, 19 R., 229; (39 S. W., 698).....884
L. & N. R. R. Co. v. Hunt, 11 R., 825; (13 S. W., 275).....906
L. & N. R. R. Co. v. Webb, 99 Ky., 332; (18 R., 258); (35 S. W., 1117).....906
L. & N. R. R. Co. v. Com., 23 R., 1900; (66 S. W., 505).....826
L. H. & St. L. Ry. Co., v. Com., 104 Ky., 35; (20 R., 371); (46 S. W., 207).....630
L. O. & T. R. R. Co. v. Ballard, 59 Ky., 165.....415
Lowry v. Com., 18 R., 481; (36 S. W., 1117).....325
Lowery v. City Lexington, 113 Ky., 763; (24 R., 516); (68 S. W., 1109).....162
Lyman v. Faris, 53 Iowa, 498; (5 N. W., 621).....179
Lynch v. Com., 24 R., 2180; (73 S. W., 745).....751
Maberly v. Strode, 3 Vesey, 456..... 65
Manning v. Johnson, 62 Am. Dec., 732.....100
Manion's Admr. v. Titworth, 57 Ky., 597..... 75
Manning v. Quicksilver Mining Co., 24 Hun., 361.....200
Manhattan Life Ins. Co. v. Patterson, 109 Ky., 624; (22 R., 611).....740
Marbury v. Madison, 1 Cranch, 170; (2 L. Ed., 60)..... 24
Marion Co. Fis. Court v. Kelly, 22 R., 174; (56 S. W., 815).....578
Marsh v. Fulton County, 10 Wall., 683; (19 L. Ed., 1040).....126
Maunderscheid v. Dubuque, 29 Iowa, 73; 4 Am. Rep., 196.....632
Mayfield Woolen Mills, &c. v. City Mayfield, 111 Ky., 172; (22 R., 1676); (61 S. W., 43)..... 34
May v. Blackburn, 15 R., 705; (25 S. W., 112).....631
Mayer v. Hellman, 91 U. S., 496; (23 L. Ed., 337).....426
Mayor Baltimore v. Reynolds, Md., 83 Am. Dec., 535.....126
Mayberry v. Inhabitants, &c., 56 Me., 342.....633
Mayfield v. Wright, 107 Ky., 530; (21 R., 1255); (54 S. W., 864)..523
Maysville, &c. R. R. Co. v. Ball., 108 Ky., 241; (21 R., 1693); (56 S. W., 188).....588
Meador v. Meador, 88 Ky., 217; (10 R., 783); (10 S. W., 651)....460
Melchert v. Am. Union Tel. Co. (C. C.), 11 Fed., 193.....843
Memphis, &c. Ry. Co. v. Thompson, 24 Ky., 170.....134
Mercer Co. Court v. Ky. River Nav. Co., 71 Ky., 300.....132
Mercer County v. Providence Life & Trust Co., 72 Fed., 623; (19 C. C. A., 58).....134
Merchants' Nat. Bank v. Robinson, 97 Ky., 552; (17 R., 368) (31 S. W., 136).....376
Meredith v. Commonwealth, 57 Ky., 49.....623

Digitized by Google

Meredith v. Com., 25 R., 455; 76 S. W., 8.....527
Millar v. Field, 10 Ky., 108.....373, 376
Miller v. New York, 109 U. S., 385; (27 L. Ed., 971).....133
Monson v. Lathrop, 96 Wis., 386; (71 N. W., 596); (65 Am. St. Rep., 54).....842
Moore v. Illinois, 14 How., 13; (14 L. Ed., 306).....830
Moore v. Baker, 92 Ky., 518; (13 R., 724); (18 S. W., 363)..... 98
Moore's Heirs v. Devisees, 34 Ky., 354; (29 Am. Dec., 417).....105
Morgan v. Winn's Admr., 17 B. Mon., 244.....733
Morgan Steamship Co. v. Louisiana Bd. of Health, 118 U. S., 455; (6 Sup. Ct., 1114); (30 L. Ed., 237).....830
Morgantown Dep. Bank v. Johnson, 108 Ky., 507; (22 R., 210); (56 S. W., 825).....579
Moredock v. Kirby (C. C.), 118 Fed., 180.....585
Mugler v. Kansas, 123 U. S., 672; (31 L. Ed., 205).....233
Muller v. Dows, 94 U. S., 444; (24 L. Ed., 207).....152
Mutual Life Ins. Co. v. Jarboe, 102 Ky., 80, (19 R., 1501); (42 S. W., 1097); (39 L. R. A., 504).....746
McArthur v. Nelson, 81 Ky., 67; (4 R., 754).....415
McCabe Case, 112 Ky., 861; (23 R., 2328); (66 S. W., 1054).....154
McCabe's Admx. v. M. & B. S. Ry. Co., 112 Ky., 861; (23 R., 2328); (66 S. W., 1054).....255
McCall v. Hitchcock, 9 Bush, 66.....590
McCann v. City of Louisville, 23 R., 558; (63 S. W., 446).....809
McCann v. Louisville, 23 R., 558; (63 S. W., 446).....179
McCue v. Commonwealth, 78 Pa., 185; (21 Am. Rep., 7).....622
McCullough v. Phoenix Ins. Co., 113 Mo., 606; (21 S. W., 207)...302
McDaniel v. Stum's Admr., 23 R., 1935; (65 S. W., 800).....537
McDermott v. K. C. Ry. Co., 93 Ky., 408; (14 R., 437); (20 S. W., 380) 906
McDonald v. Brown, 51 Atl., 213; (58 L. R. A., 768).....439
McLaughlin v. Lou. Electric Light Co., 100 Ky., 189; (18 R., 693) (37 S. W., 851); (34 L. R. A., 812).....456
McKinney v. Griggs, 5 Bush, 405; (96 Am. Dec., 360).....629
Nash v. Tupper, 1 Caines, 402; (2 Am. Dec., 197).....794
Neaf v. Palmer, 103 Ky., 496; (20 R., 176); (45 S. W., 506).....238
Nelson, Morris & Co. v. Rehkopf & Sons, 25 R., 352; (75 S. W., 203) 585
Nevin v. Sears, 155 Mass., 303; (29 N. E., 472).....469
New York Life Ins. Co. v. Warren Deposit Bank, 24 R., 325; (75 S. W., 234) 746
New Jersey v. City of Elizabeth, 35 N. J. Law.....351
Newby v. Hill, 59 Ky., 553.....376
Newport & Cin. Bridge Co. v. Douglas, 75 Ky., 705.....522

Digitized by Google

Newport v. Masonic Temple Co., 108 Ky., 333; (21 R., 1785); 56 S. W., 405).....723
Northern Pac. Ry. Co. v. Keyes (C. C.), 91 Fed., 47.....272
Norton v. Sewall, 106 Mass., 143; (8 Am. Rep., 298).....561
Norton v. Shelley Co., 118 U. S., 425; (6 Sup. Ct., 1121); (30 L. Ed., 178) 134
N. & Cin. Bridge Co. v. Woolley, 78 Ky., 523.....564
N. N. & M. V. R. R. Co. v. Com., 14 R., 197.....307
N. P. R. R. Co. v. Herbert, 116 U. S., 642; (29 L. Ed., 755).....321
Ober v. Gallagher, 93 U. S., 199; (23 L. Ed., 829).....807
Odd Fellows v. Bosworth, 112 Ky., 200; (23 R., 1505); (65 S. W., 591) 723
Odell v. City Atlanta, 97 Ga., 670; (27 S. E., 173).....831
Oglesby v. Attrill (C. C.), 14 Fed., 214; (4 Woods, 114).....589
Onions v. C. & C. Elevated R. R. T. Bridge Co., 107 Ky., 154; (21 R., 820); (53 S. W., 8).....663, 669
Ormsby v. City of Louisville, 79 Ky., 201; (2 R., 297).....878
Ottawa v. Carey, 108 U. S., 110; (2 Sup Ct., 361); (27 L. Ed., 669) 126
O'Daniel v. O'Daniel, 88 Ky., 185; (10 R., 760); (10 S. W., 1282); (60 S. W., 383); (53 L. R. A., 378).....746
O'Brien v. Com., 89 Ky., 354; (11 R., 534); (12 S. W., 471.....940
O'Brien v. Com., 115 Ky., 608; (24 R., 2511); (74 S. W., 666)....940
Paducah & M. R. R. Co. v. Hoehl, 75 Ky., 49.....906
Page v. Hardin, 8 B. M., 648.....21, 22
Parsons v. Chicago & Ry. Co., 167 U. S., 447; (17 Sup. Ct., 887)..912
Parsons v. Spencer, 83 Ky., 305; (7 R., 329).....396
Passenger Cases, 7 How., 283; (12 L. Ed., 702).....830
Patterson v. Kentucky, 97 U. S., 501; (24 L. Ed., 1115).....848
Patterson v. Com., 11 Bush, 312; (21 Am. Rep., 220); (97 U. S., 501); (24 L. Ed., 1115).....830
Patty-Joiner Co. v. Cummins, 93 Tex., 598; (57 S. W., 566).....427
Pearson v. Baker, 34 Ky., 321.....448
Peckham Iron Co. v. Harper, 41 Ohio St., 100.....380
Peck v. State, 137 N. Y., 372; (33 N. E., 317).....184
Pendergest v. Heekin, 94 Ky., 384; (15 R., 180); (22 S. W., 605)..460
Pennington v. Lawson, 23 R., 1340; (65 S. W., 120).....980
Pennoyer v. Neff, 95 U. S., 714; (24 L. Ed., 565).....585
Pennoyer v. Neff, 95 U. S., 714; (24 L. Ed., 565).....792
People v. Lochfelm, 102 N. Y., 1; (5 N. E., 783).....633
People v. Faulkner, 107 N. Y., 477; (14 N. E., 415).....683
People's Ferry Co. v. Beers, 20 How., 393; (15 L. Ed., 961).....708
People v. House, 4 Utah, 382; (10 Pac., 843).....589
People v. Squire, 110 N. Y., 666; (18 N. E., 362).....184
People v. City St. Louis, 48 Am. Dec., 339.....233

Digitized by Google

People's Ferry Co. v. Balch, 74 Mass., 303.....134
Person v. I. C. R. R. Co. (C. C.), 118 Fed., 342.....154
Peterson v. W. U. Tel. Co., 72 Minn., 41; (74 N. W., 1022) (40 L. R. A., 661); (71 Am. St. Rep., 461).....842
Peynado's Devisees v. Exr., 82 Ky., 5; (5 R., 713).....678
Phelps v. Phelps, 143 Mass., 570; (10 N. E., 452)..... 65
Picquet v. Swan, 5 Mason, 35 Fed. Cas. No. 11134.....790
Pittsburg & R. R. Co. v. Bingham, 29 Ohio St., 364.....557
P. C. C. & St. L. Ry. Co. v. Dodd, 115, 176; (25 R., 255); (72 S. W., 882) 265
Piqua v. Zimmerlin, 35 Ohio St., 507.....210
Plumley v. Massachusetts, 155 U. S., 461; (15 Sup. Ct., 154); (39 L. Ed., 223).....848
Pomfrey v. Saratoga Springs, 34 Hun., 607.....633
Pope v. Allis, 115 U. S., 363; (6 Sup. Ct., 69); (29 L. Ed., 393) 380
Pope's Exr. v. Elliott, 8 B. Mon., 56.....393
Potts v. Clark, 23 R., 332; (62 S. W., 884).....631
Porter v. Attica, 33 Hun., 605.....633
Powers v. Daugherty, 83 Ky., 187; (7 R., 54).....870
Preston v. Rudd, 84 Ky., 156; (7 R., 806).....858
Preston v. Rudd, &c. 84 Ky., 156; (7 R., 806).....142
Provident Life & Trust Co. v. Mercer Co., 170 U. S., 593; (18 Sup. Ct., 788); (42 L. Ed., 1156).....126
Providence Trust Co. v. Mercer County, 170 U. S., 602; (18 Sup. Ct., 788); (42 L. Ed., 1156).....134
R. R. Co. v. Osborne, 52 Fed., 911; (3 C. C. A., 347).....912
Raridan v. Cent. Iowa Ry. Co., 69 Iowa, 527; (29 N. W., 599)...380
Rauber v. Whitney, 125 Ind., 216; (25 N. E., 186).....589
Reliance T. & D. Works v. Mitchell, 24, 1286; (71 S. W., 425).....550
Respass v. Com., 107 Ky., 139; (21 R., 789); (53 S. W., 24)....329
Rice, &c. v. Fidelity & Dep. Co., 103 Fed., 427; (43 C. C. A., 270) 51
Richardson v. Tobin, 45 Cal., 30.....878
Richardson v. Boske, 111 Ky., 893; (23 R., 1209); (64 S. W., 919) 35
Riddle v. Cutter, 49 Iowa, 547.....342
Rife's Appeal, 110 Pa., 232, 1 Atl., 226.....342
Riley v. Lee, 88 Ky., 603; (11 R., 586); (11 S. W., 713).....285
Robinson v. Smithey, 80 Ky., 636; (4 R., 541).....757
Roberson v. Kennedy, 2 Dana, 431; (26 Am. Dec., 426).....911
Rogers v. Trustees, &c., 11 R., 935; (13 S. W., 587).....488
Roll v. Stum, 20 R., 661; (46 S. W., 223).....537
Roseberry's Admr. v. N. N. & M. V. R. R. Co., 19 R., 194; (39 S. W., 407).....906

Digitized by Google

Ross v. Thompson, 78 Ind., 90.....633
Ruffner, &c. v. Ridley, &c., 81 Ky., 169; (4 R., 958).....925
Sale v. Thornberry, 86 Ky., 266; (9 R., 472; (5 S. W., 468).....396
Salisbury v. Bigelow, 20 Peck Mass., 174.....347
Samis v. King, 40 Conn., 312.....185
Sargent v. Baldwin, 60 Vt., 17; (13 Atl., 854).....345, 347
Sasseen v. Hammond, 18 B. Mon., 673.....808
Sauls v. Freeman, 24 Fla., 209; (4 South., 525).....179
Schmidt v. L. & C. R. R. Co., 99 Ky., 143 (18 R., 65); (35 S. W., 135); (36 S. W., 168).....178
School Dist. v. Stone, 106, 183; (1 Sup. Ct., 84); (27 L. Ed., 90)..126
School Dist. No. 1 v. Bragdon, 23 N. H., 507.....488
Scottish Union, &c. Ins. Co. v. Strain, 24 R., 958; (70 S. W., 274).....302
Seavey v. Walker, 108 Ind., 78; (9 N. E., 347).....709
Severy v. Nickerson, 120 Mass., 306; (21 Am. Rep., 514).....558
Shackelford's Admr. v. L. & N. R. R. Co., 84 Ky., 43; (7 R., 729).156
Shanklin v. Moody, 23 R., 2063; (66 S. W., 502).....477
Sheldon v. Hudson River R. R., 14 N. Y., 218.....314
Shelby Co. Ct. v. C. & O. R. R. Co., 71 Ky., 209.....120
Sherban v. Com., 8 Watts, 212; (34 Am. Dec., 460).....543
Sherill v. Hopkins, 1 Cow., 103.....794
Shortell v. Green Co., 22 R., 1010; (59 S. W., 522); (23 R., 144); (63 S. W., 979).....124
Sidener v. Bible, 43 Ind., 230.....709
Simonson v. Sinsheimer, 95 Fed., 948.....426
Simpson Co. v. L. & N. R. R. Co., 14 R., 673; (19 S. W., 666)...198
Smith v. Flora 64 Ill., 93.....633
Smith v. Western Union Tel. Co., 84 Ky., 665; (8 R., 672); (2 S. W., 483).....841
Smoot v. Heyser's Exr., 113 Ky., 81; (23 R., 2401); (67 S. W., 21).....656
Sneed's Exr. v. White, 3 J. J. Mar., 526; (20 Am. Dec., 175).....573
Snow v. Housatonic R. R., 8 Allen, 450; (85 Am. Dec., 720).....322
Soule v. Chase 30 N. Y., 342.....796
Southern Ry. Co. v. Allison, 23 Sup. Ct., 713; (47 L. Ed., —)....153
Spaulding v. St. Joseph's Ind. School, 107 Ky., 382; (21 R., 1107) (54 S. W., 206).....106
Spurrier v. Bland, 20 R., 1340; (49 S. W., 467).....629
St. L. R. R. Co. v. James, 161 U. S., 545; (40 L. Ed., 802).....152
State v. Fisher, 117 N. C., 733; (23 S. E., 158).....633
State v. Eisels, Minn., 33 N. W., 785.....633
State v. Griffin, 16 Ind., App., 558; (45 N. E., 936).....709
State v. Patterson, 39 Atl., 655.....724
State v. Houston, 78 Ala., 576.....683

Digitized by Google

State v. Copeland, Tenn. Sup., 34 S. W., 427.....683
State v. Mahan, 2 Ala., 340.....543
State, *ex rel.* Brown v. C. & L. R. R. Co., 13 S. C., 290.....180
State v. Purtell, 56 Kan., 483; (43 Pac., 783).....229
State v. Olympic Club, 47 La. Ann., 1095; (17 South., 599).....229
Stahl v. Brown, 84 Ky., 328; (8 R., 279); (1 S. W., 540).....808
Steele v. Sullivan, 70 Ala., 589.....633
Steele v. Aloe (Mo.), 54 S. W., 494; (47 L. R. A., 399).....810
Stembridge v. Stembridge, 87 Ky., 91; (9 R., 948); (7 S. W., 638).....627
Stern v. Schlesinger, 5 N. Y. Supp., 1.....795
Sterger v. Van Sicien (N. Y.), 30 N. E., 987; (16 L. R. A., 640); (28 Am. St. Rep., 594).....559
Stevens v. Stevens., 21 R., 1315; (54 S. W., 835)..... 69
Stith v. L. & N. R. R. Co., 109 Ky., 174; (22 R., 653); (58 S. W., 600).....916
Stinson v. Minor, 34 Ind., 89.....708
Stone v. Mississippi, 101 U. S., 814; (25 L. Ed., 1079).....848
Stone v. King, 7 R. I., 358; (84 Am. Dec., 557).....347
Stum v. Roll, 25 R., 208; (74 S. W., 1115).....537
Sturgis v. Fay, 16 Ind., 429; (79 Am. Dec., 440).....589
Sullivan v. City Boston, 126 Mass., 542.....854
Sullivan v. State, 67 Miss., 352; (7 South., 276).....236
Sun Mutual Ins. Co. v. Crist, 19 R., 305; (39 S. W., 837).....302
Suter, &c. v. Quarles, &c., 22 R., 1080; (58 S. W., 990).....758
Swain v. Seamens, 9 Wall., 254; (19 L. Ed., 554).....740
Swinebroad v. Bright, 23 R., 55; 62 S. W., 484.....516
Talbot v. Talbot, 17 B. Mon., 1.....870
Taliaferro v. Gay, 78 Ky., 496.....522
Tarr v. Kimbrough, 17 R., 1284; (34 S. W., 528).....745
Taylor v. Patrick, 1 Bibb, 168.....970
Taylor, Jr. v. Lou. Pub. Warehouse Co., 24 R., 656; (72 S. W., 20).....550
The Moses Taylor v. Harmons, 4 Wall., 411; (18 L. Ed., 397)...699
The Steamboat, Ad. Hine v. Trevor, 4 W., 555; (18 Ed., 451)....699
The Belfast, 7 Wall., 624; (19 L. Ed., 266).....699
The Genesee Chief, 12 How., 443; (13 L. Ed., 1058).....699
The Dick Keyes, 1 Biss, 408 Fed., Cas. No. 3898.....701
The City of Pittsburg (D. C.), 45 Fed., 699.....701
The Old Natchez (D. C.), 9 Fed., 476.....706
Thomas v. Winchester, 6 N. Y., 397; (57 Am. Dec., 455).....561
Thorpe v. Mo. Pac. Ry. Co., 2 S. W., 3.....321
Thompson v. Koch, 98 Ky., 400; (17 R., 941); (33 S. W., 96)....527
Thornberry v. Churchill, 20 Ky., 29; (16 Am. Dec., 125).....448
Tong, &c. v. Elfort, &c., 80 Ky., 152; (3 R., 647).....460

Digitized by Google

Town of Colonia v. Evans, 92 U. S., 484; (23 L. Ed., 579).....126
Townes v. Durbin, 60 Ky.. 355; (77 Am. Dec., 176)..... 70
Townsend v. Wilson, 24 R., 1276; (71 S. W., 440).....519
Tozer v. U. S., (C. C.), 52 Fed., 918.....912
Trapp v. City Newport, 25 R., 224; (74 S. W., 1109).....502
Tilton v. Beecher, 59 N. Y., 176; (17 Am. Rep., 337).....433
Trimble v. Ward, 97 Ky., 748; (17 R., 508); (31 S. W., 864)....401
Tinsley v. Tinsley, 15 B. Mon., 459.....783
Trustees of Dover v. Fox, 9 B. Mon., 201.....629
Tully v. Com., 13 Bush, 153.....306
Turner v. Gill, 105 Ky., 414; (20 R., 1253); (49 S. W., 311).....477
Turner v. Mitchell, 22 R., 1784; (61 S. W., 468).....519
Turnbull v. Payson, 95 U. S., 421; (24 L. Ed., 437).....193
Uhrig v. Williamsburg Fire Ins. Co., 101 N. Y., 362; (4 N. E., 745) 302
U. S. v. Blaine, 139 U. S., 306-319; (11 Sup. Ct., 607)..... 25
U. S. Bank v. Donnally, 33 U. S., 361; (8 L. Ed., 974).....797
U. S. v. Prescott, 3 How., 578.....682
U. S. v. Robeson, 9 Pet., 319; (9 L. Ed., 142).....300
U. S. v. Thomas, 15 Wall., 337.....682
Vallandingham v. Johnson, 85 Ky., 289; (8 R., 940); (3 S. W., 173) 98
Vallse v. Dumergue, 4 Exch., 290.....586
Veeder v. Town of Lima, 19 Wis., 287.....129
Venable v. Smith's Exr., 1 Duv., 496.....733
Virginia Ry. Co. v. Washington, 86 Va., 629; (10 S. E., 927)....256
Voss v. Union School Dist., 18 Kan., 467.....184
Wainwright v. Wainwright, 3 Ves. Jr., 558..... 68
Walters v. Chicago R. R. Co., 186 U. S., 479; (47 L. Ed., —);.....153
Warren v. Jacksonville, 15 Ill., 236; (58 Am. Dec., 610).....633
Warren v. Glynn, 37 N. H., 340.....269
Washingon Life Ins. Co. v. Miles, 112 Ky., 743; (23 R., 1705); (66 S. W., 740).....746
Watson v. Wilson, 2 Dana, 406; (20 Am. Dec., 459).....250
Weakley, Trustee v. Buckner, 91 Ky., 457; (13 R., 17); (16 S. W., 130) 346
Weaver v. Toney, 107 Ky., 419; (21 R., 1157); (54 S. W., 732)..809
Weber v. Com., 24 R., 1726; (72 S. W., 30).....415
Webster v. Wathen, 97 Ky., 318; (17 R., 33); (30 S. W., 663)....394
Weber v. Com., 24 R., 1726; (72 S. W., 30).....836
Weind's Admr. v, State Nat. Bank, 112 Ky., 310; (23 R., 1517) (65 S. W., 617); (66 S. W., 26).....376
Weinstock v. Bellwood, 75 Ky., 139.....372
Western Union Tel. Co. v. Daniels, 15 R., 813..... 11

Digitized by Google

Western Union Tel. Co. v. Mathews, 107 Ky., 663; (21 R., 1405); (55 S. W., 427)..... 11
Wheeler v. Warner, 47 N. Y., 519; (7 Am. Rep., 478).....408
Wheeler v. Barrow, 18 Ind., 14.....489
Whitcomb v. Rodman, 28 L. R. A., 149..... 65
Whittemore v. Adams, 2 Cow., 626.....792
Whitfield v. S. E. R. Co., 1 El. B. & El., 115.....842
White v. Sale, 7 Ky. Law Rep., 570.....655
Wickliff v. City Lexington, 11 B. Mon., 155.....629
Williams' Exr. v. Williams, 90 Ky., 28; (13 S. W., 250); (11 R., 828) 518
Williams v. Preston, 26 Ky., 600; (20 Am. Dec., 179.....792
Williamson v. Com., 4 B. Mon., 146.....825
Williamson v. Yeager, 91 Ky., 286; (13 R., 273); (15 S. W., 661)..979
Wilkins v. Barnes, 79 Ky., 323; (1 R., 328).....634
Wilson v. Riney, 74 Mo., 229.....179
Wilson, &c. v. Linville, 96 Ky., 50; (14 R., 150); (16 R., 340); 27 S. W., 857) 400
Wilson v. People, 19 Colo., 199; (34 Pac., 944).....683
Wixon v. Newport, 13 R. I., 554; (43 Am. Rep., 35).....854
Wood v. The Two Barges (C. C.), 46 Fed., 204.....701
Wood v. Leadbetter, 3 M. & W., 838.....558
Wright v. Willis, 23 R., 565; (63 S. W., 991).....631
Wren v. Baske, Sheriff, 24 R., 1980; (72 S. W., 279).....957
Wren v. Ficklen, 109 Ky., 472; (22 R., 1035); (59 S. W., 746)...477
Wren v. Boske, 25 R., 1780; (72 S. W., 279).....565
W. U. Tel. Co. v. James, 162 U. S., 650; (16 Sup. Ct., 934).....843
York Co. v. Watson, 15 S. C., 1.....683
Young v. The Ship Orphans, 2 Cliff, 29; (Fed. Cas. No. 18169...708
Zoibish v. Tarbell, 87 Am. Dec., 736, (note).....559

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(As now constituted, 1905.)

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ASSOCIATE JUSTICES.

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DECISIONS

OF THE

Court of Appeals of Kentucky.

APRIL TERM, 1903.

CASE 1—MOTION OF HAZELRIGG & CHENAULT FOR AN ALLOWANCE OF AN ATTORNEY'S FEE FOR PROSECUTING JAMES SIMS FOR SOLICITING LIFE INSURANCE WITHOUT A LICENSE.—JUNE 11.

Sims v. Commonwealth.

APPEAL FROM DAVIESS CIRCUIT COURT.

MOTION OVERRULED.

ATTORNEY'S FEES—EMPLOYMENT BY INSURANCE COMMISSIONER—CLAIM AGAINST TREASURY—DUTY OF ATTORNEY GENERAL.

Held: Kentucky Statutes, 1899, section 113, requires the Attorney General to attend in behalf of the Commonwealth in all cases in which it is interested, except where it is the duty of the county attorney to represent the State. Section 117a declares that, in all cases in the Court of Appeals in which the Attorney General is required to appear, he shall receive for his services the sum of $20, to be paid from the State Treasury, &c.; and section 118 requires the Commonwealth attorney to prosecute all violations of criminal and penal laws in the circuit court. Criminal Code, section 354, contains the same provision as in section 117a, Kentucky Statutes, 1899, as to the taxed attorney's fee, and section 356 contains a like provision as to the damages awarded in each case. HELD, that Kentucky Statutes, 1899, section 762, authorizing the Governor to allow a reasonable compensation to attorneys of the Insurance Department for services rendered in enforcing laws relating to insurance companies, provided that, in cases tried by any court, such compensation shall be adjudged by the court, should be construed in connection with such previous sections, and hence did not justify an allowance for services of attorneys other than the Attorney General who represented the State in the Court of

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Appeals in the successful prosecution of an insurance agent for soliciting life insurance without a license from the Insurance Commissioner.

HAZELRIGG & CHENAULT, OF COUNSEL.

While we concede that the Court of Appeals is essentially an appellate court with appellate jurisdiction, still, at the same time, we do not understand that the court is precluded from fixing attorneys' fees for non-resident attorneys, &c., where services are rendered in the court. Especially is this true where there is a statute authorizing the court to fix these fees. Section 762 of the Kentucky Statutes says that attorneys for the Insurance Department shall have their fees fixed by the court trying the case. It is true that the case was tried in the Daviess Circuit Court, but counsel here had nothing to do with the trial in that court. When it came to a trial of the case in the Court of Appeals we were employed there and it seems but proper that the court where the case was tried should fix the compensation, said court being familiar with the services rendered and being a court of competent jurisdiction. In fixing this compensation we do not understand that the court is in the least exercising any original jurisdiction. Such allowance is, if anything under the statute, a mere incident to its appellate jurisdiction.

We trust the court will see its way clear to allow the fee.

OPINION OF THE COURT BY JUDGE HOBSON—OVERRULING.

James Sims was indicted in the Daviess circuit court for the offense of soliciting life insurance, as the agent of a foreign company, without having first procured a license from the Insurance Commissioner, authorizing him to act as such. He was fined $100. He prosecuted an appeal to this court, and the judgment of the Daviess circuit court was affirmed. See Sims v. Commonwealth, 114 Ky., 827, 24 R., 1591, 71 S. W., 929. It was a test case. Messrs. Hazelrigg & Chenault, attorneys, who appeared for the Commonwealth on that appeal, have now entered a motion that this court enter an order allowing them the sum of $500 as a fee for their services in the case, payable out of the State Treasury, on the ground that they were employed by the

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Insurance Commissioner to prosecute the case. The only question we deem it necessary to consider is whether there is any authority of law for the allowance. The statutes to which we have referred are the provisions of subdivision 8, c. 32, Kentucky Statutes, 1899, creating the Insurance Department (sections 744-762). The only sections that seem to have any bearing on the case are these:

"There is hereby established in connection with the office of Auditor of Public Accounts a department to be designated the Insurance Department, which shall be charged with the enforcement of the laws heretofore passed or which may hereafter be passed relating to insurance." Section 744.

"The Governor may allow such reasonable compensation to attorneys or agents of the Insurance Department for services rendered and for expenses incurred in enforcing the laws relating to insurance companies, as he may deem proper: provided that in all cases tried by any court of competent jurisdiction such compensation shall be adjudged by the court. . . ." Section 762.

The statute forbidding an agent of a foreign company from soliciting life insurance without having first obtained a license from the Insurance Commissioner comes within the purview of section 744; and the commissioner is, under that section, charged with its enforcement. But whether section 762 contemplates the employment of attorneys to prosecute criminal cases, or appeals in those cases in this court, is a different matter. These sections must be read in connection with the other provisions of the Kentucky Statutes. By section 113 it is made the duty of the Attorney General to attend in behalf of the Commonwealth to all cases and proceedings in which she may be interested, except where it is made the duty of the Commonwealth or

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county attorney to represent the Commonwealth. And by section 117a, a taxed attorney's fee of $20 is provided in each case in which it is his duty to represent the State, to be taxed against the unsuccessful party and paid into the State Treasury. By section 118 it is the duty of the Commonwealth attorney to prosecute all violations of the criminal and penal laws in the circuit court. In section 354 of the Criminal Code the same provision, in substance, is made as in section 117a, Kentucky Statutes, 1899, as to the taxed attorney's fee, and a like provision is made in section 356 as to the damages awarded in such cases. These statutes, taken together, clearly make it the duty of the Attorney General to prosecute appeals in criminal and penal cases taken by the defendant to this court; and, when the State had thus provided its legal machinery, it is hard to conceive that it was contemplated that the insurance commissioner should employ counsel in this court to discharge the duties imposed by law upon the Attorney General. The rule is elementary that claims upon the public treasury are never allowed on doubtful inference. To open the door of the Treasury, there must be a clear warrant of law for the payment of the claim. It is also elementary that the provisions of the different sections of the revision known as the "Kentucky Statutes" must be read together, and that one section will not be read in conflict with another if this can be fairly avoided. Under this rule, we do not think that section 762 can be held to warrant the employment of counsel in this court to represent the Commonwealth on appeals taken in criminal or penal cases. See Coulter, Auditor, v. Denny, 23 R., 1619, 67 S. W., 65.

The motion for an allowance is therefore overruled.

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CASE 2—SOPHIA CROSS' ADMR. AGAINST WESTERN UNION TELEGRAPH CO. FOR FAILURE TO DELIVER TELEGRAM.—JUNE 11.

Western Union Telegraph Co. v. Cross' Admr.

APPEAL FROM HOPKINS CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

TELEGRAPHS—MESSAGES—DELIVERY—DELAY—NEGLIGENCE — PUNITIVE DAMAGES—FREE DELIVERY LIMITS—RULES—EVIDENCE.

Held: 1. In an action for failure to deliver a telegram with reasonable despatch, in which plaintiff suffered no physical injury, defendant was not liable for punitive damages.

2. Where, on receipt of a telegraph message at its destination without street address or number of the addressee, it was at once delivered to a messenger, who spent all of the afternoon of the day in searching for information as to the addressee, without success, whereupon he returned the message to the office, and a service message was sent to the original station for more specific address, and on receipt of another telegram the message was delivered, the telegraph company was not guilty of gross negligence in delivering the message.

3. Where a telegraph message was addressed to plaintiff's intestate, an obscure colored woman, living nearly a mile from the company's office, in a city of less than 5,000 inhabitants, without the street or number of her residence being given, and the sender of the message had not prepaid or guaranteed a delivery fee, it was error, in an action for delay in delivering the message, to exclude a rule of the company providing that messages would be delivered to persons residing more than a half mile from the company's office in cities of less than 5,000 inhabitants on the actual cost of delivery being prepaid or guaranteed.

RICHARDS & RONALD, FOR APPELLANT.

The telegram to Mrs. Sophia Cross from Kansas City, Missouri, announcing the death of her daughter, Emma Baxter, was received at Madisonville, Kentucky, about noon on October 21, 1899. It did not contain, nor did the defendant have any information as to the race, color, place of residence, or occupation of Mrs. Cross. A diligent search failing to disclose her whereabouts, early the next morning a message was sent to Kansas City informing the sender that they were unable to

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find Mrs. Cross. On October 23d a message was received at Madisonville by defendant addressed to David Cross, care Monarch Coal Mines. Upon David Cross' calling at the office of the company in response to a notification that the telegram was there, the company, upon inquiry, learned from him that Sophia Cross was his mother and the message to her was delivered to him.

This suit was brought by Sophia Cross to recover damages for mental anguish by reason of not being able to attend her daughter's funeral. Pending the suit, she died, and the action was revived in the name of her administrator.

On the trial a verdict was returned for the plaintiff for $300, from which this appeal is prosecuted.

A reversal is asked upon the following grounds:

(1) The defendant's motion for a peremptory instruction should have been given.

(2) The instructions given by the court are erroneous in that they permit a recovery for punitive damages, and because they permit a recovery for any damages.

(3) Instruction "D," asked for by appellant, should have been given, which is as follows:

"Although the jury may believe from the evidence that the defendant's agents failed to use that degree of care and diligence defined in instruction No. 3, they can not find a verdict for the plaintiff unless they further believe from the evidence that the injuries complained of were directly or proximately caused by such failure; that is to say, that unless they believe from the evidence that if the telegram in question had been promptly delivered, plaintiff intended to go, and could have gone to Kansas City, Mo.; that she possessed the ability to make the journey and that she could and would have arrived in time to be present at the burial of her daughter, their verdict should be for the defendant."

AUTHORITIES CITED.

Western Union Tel. Co. v. May, 27 S. W., 261; Cumberland Telephone Co. v. Brown (Tenn.), 55 S. W., 155; Western Union Tel Co. v. Smith, 30 S. W., 549; Western Union Tel. Co. v. Daniels, 15 R., 813; Same v. Matthews, 67 S. W., 849 (21 Rep., 1405).

C. J. WADDILL, FOR APPELLEE.

The real excuse for the gross neglect of appellant to deliver a death message was a supposed rule of the company establishing one-half-mile free delivery limit, and Sophia Cross, the ad-

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dressee, lived within the city just outside said limit; but said excuse is unavailing for reasons set forth in brief.

AUTHORITIES CITED.

Webbe v. W. U. Tel. Co., 61 Am. St. Rep., 207, and note; Whittemore v. W. U. Tel. Co., 71 Fed. Rep., 651; Hendricks v. W. U. Tel. Co., 78 Am. St. Rep., 658, and note; W. U. Tel. Co. v. Moore, 54 Am. St. Rep., 515, and note; W. U. Tel. Co. v. Robinson, 34 L. R. A., 431, and note; W. U. Tel. Co. v. McKibben, 114 Ind., 511; Clement v. W. U. Tel. Co., 137 Mass., 463.

OPINION OF THE COURT BY JUDGE BARKER—REVERSING.

This action was instituted in the Hopkins circuit court by Sophia Cross to recover damages from the Western Union Telegraph Company for its failure to deliver to her a telegram sent from Kansas City, Mo., conveying the information of the death of her daughter Emma Baxter in time to enable her to attend the funeral, whereby she was caused great mental pain and distress, and suffered damage in the sum of $1,500. The failure of the telegraph company is alleged to have been caused by its gross negligence. The company, by its answer, denied the negligence charged in the petition, and pleaded the existence of a rule adopted by it which established in cities containing less than 5,000 inhabitants a free delivery boundary or limit, consisting of all the territory within a radius of a half mile of the office of the company; that outside of this free delivery limit it would not deliver telegrams without the payment of an extra delivery fee; that Madisonville is a city of less than 5,000 inhabitants, and that Sophia Cross lived therein at a greater distance than one-half mile from the office of the company; and that the sender of the message in question had not prepaid or guarantied the extra delivery fee required by the rule. After the issues were made up, but before a trial of the case, Sophia Cross died, and the action was revived in the name of her administrator. Upon

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the trial the jury awarded a verdict of $300 in damages against the company, and, its motion for a new trial having been overruled, it is here on appeal.

Sophia Cross was a negro woman living in Madisonville, Ky. Her daughter Emma Baxter died in Kansas City, Mo., on the 21st day of October, 1899. On the day of her death, her husband, James T. Baxter, sent the following message to the mother: "Kansas City, Mo. To Mrs. Sophia Cross, Madisonville, Ky.—Emma Baxter is dead, please come. James T. Baxter." This message was received at the company's office in Madisonville on the same day that it was sent, at 11:40 A. M. Immediately upon its receipt at the delivery office, it was written out and delivered to a messenger, with instructions to find the addressee and deliver the message to her. The telegram contained no street number or address, nor any information as to the color or nationality of the person to whom it was addressed. The messenger, upon receiving the telegram, proceeded to search for the whereabouts of Sophia Cross. He states—and in this he is not contradicted—that he inquired at the postoffice, the hotels, and of various persons, white and colored whom he met upon the street, or whom he suspected might know something of the residence of the addressee of the message. He further states that, after a diligent search and inquiry, he was wholly unable to locate the address of appellee's decedent; that, after the expiration of several hours' search, he returned the telegram to the office, with the information that he could not locate the person entitled to it. The operator at the delivery office then sent what is called a "service telegram" to the office at Kansas City, stating that Sophia Cross could not be found, and asking for a more definite address. This service telegram was sent on the morning of the 22d of October. On the

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morning of the 23d of October, there was received at the office in Madisonville a telegram from Kansas City concerning the death of Emma Baxter, directed to David Cross, stating that he worked at the Monarch mines. On receiving this telegram, the operator telephoned David Cross, at the Monarch mines, and he at once called at the office and obtained the message. Struck by the similarity of the names, the operator inquired of him if he knew Sophia Cross, in answer to which interrogatory he responded that she was his mother, whereupon the telegram for her was delivered to him, and he in turn delivered it to his mother. Emma Baxter was buried in the afternoon of October 23, 1899, and, at the time Sophia Cross actually received the telegram conveying the information of the death of her daughter, she could not have attended the funeral, although we think the evidence shows that she could and would have attended it, had the telegram addressed to her been delivered during the day of October 21st. The verdict rendered, as compared with verdicts usually awarded by juries in such cases, can not be considered excessive.

The appellant complains of two errors of the court, which we think are well taken: First, that the court erred in instructing the jury on the subject of gross negligence and punitive damages; second, in excluding from the consideration of the jury the existence of the rule as to a free delivery limit, and the failure to give an instruction predicated thereon. We have been cited to no authority holding that in a case like this, based wholly upon a breach of contract, unattended with any physical injury, the defendant is liable for anything more than compensatory damages; and we think the trial court erred in giving the instruction on gross negligence, authorizing the infliction of punitive damages. Moreover, we think the evidence in this case

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wholly failed to show gross negligence on the part of appellant in failing to deliver the telegram. The uncontradicted evidence shows that, upon its receipt in Madisonville without street address or number, it was written out and delivered at once to the messenger; that this messenger spent nearly all of the afternoon of the day on which it was delivered to him in searching for information as to the whereabouts of the addressee, without being able to find her, and he thereupon returned it to the office, and a service message was sent to Kansas City for more specific information in regard thereto. It was evidently in response to this service message that the telegram was sent to David Cross, the son of appellee's decedent, through whom the telegram to Sophia Cross was finally delivered. There is evidence in the record to show that David Cross, the husband of Sophie Cross, worked in some menial employment not far from the office of appellant; also that one of his sons had several years before been a messenger in appellant's service. But the messenger who had charge of the telegram in question did not know these people, or their relationship to Sophia Cross. We are unable to see, considering that Sophia Cross was an obscure colored woman, living nearly a mile from the office of appellant, how it could be charged with gross negligence, in the face of the uncontradicted testimony showing that its servants had made the effort herein set forth to deliver the message on the day that it was received at Madisonville.

Upon the trial of the case, appellant introduced in evidence rule 50, which is as follows: "Messages will be delivered free within a radius of one-half mile from the office in any city or town of less than 5,000 inhabitants, and within a radius of one mile from the office in any city or town of 5,000 or more inhabitants. Beyond these limits

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only the actual cost of the delivery service will be collected; the manager will, however, see that such cost is as reasonable as possible." In the case of Western Union Telegraph Company v. Daniels, 15 Ky. Law Rep., 813, on this subject, the superior court said: "Where a person to whom a telegram was addressed resided two miles from the telegraph station of a small town, in an action by him against the company to recover damages on account of delay in delivering the message, it was error to instruct the jury that, if the telegram could have been received by plaintiff, 'by the exercise of ordinary diligence in searching for him in the town,' in a reasonable time 'after it should have been received at the office,' the law was for the plaintiff. As the plaintiff did not reside in town, and the company is not required to deliver messages to persons residing as far as two miles in the country, unless it is paid or specially undertakes to do so, the only duty of the operator was to use ordinary diligence to learn whether the plaintiff was in town, and, if so, then to use ordinary diligence to deliver the message to him. It is too much to require the company in such cases to make diligent search for the party." In the case of Western Union Telegraph Co. v. Mathews, 107 Ky., 663, 21 R., 1405, 55 S. W., 427, the court said: "The telegram, the failure to deliver which promptly is sought to be made the basis of recovery in this case, was sent during the afternoon of November 12, 1896, from Springfield, Kentucky, to appellee at Shelbyville, Kentucky. The operator at Shelbyville received it promptly, but, ascertaining that appellee lived in the country some four and a half miles, so notified the agent at Springfield. At about one o'clock on the next afternoon (the 13th) the Shelbyville agent was notified that the charges for delivering in the country were guarantied, and to deliver by special mes-

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senger. There was a failure to do this, under circumstances which conduce to show negligence on the part of the company's agent, but it is clear there was no obligation on the company to deliver in the country until after a guaranty of charges. The instructions to the jury are not explicit in this respect. Indeed, the second instruction imports to the contrary. An instruction offered by the appellant on this behalf (No. 5) should have been given. The error in refusing it was clearly prejudicial." The uncontradicted evidence of the surveyor of Hopkins county showed that Sophia Cross lived more than a half mile from the company's office, on an air line, and that, by the nearest route by which that distance could be traveled, she lived four-fifths of a mile from the office. The company rule establishing the free delivery limit is entirely reasonable, if not absolutely necessary; and, as the addressee lived outside of the free delivery limit of Madisonville, it was the duty of the sender of the message either to prepay or guaranty the extra delivery fee. The trial court should not have excluded the evidence of this rule from the jury, and should have given the instruction asked by the appellant, based upon its existence.

For these errors the judgment is reversed for proceedings consistent with this opinion.

Whole court except Judge Nunn sitting.

Response by Judge Hobson on petition for rehearing:

So much of the opinion as refers to the half-mile limit or rule 50, introduced in evidence, is withdrawn. We adhere to our ruling that on the facts of this case no instruction on punitive damages should have been given. The numerical weight of authority is against the allowance of substantial damages for the non-delivery of social tele-

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grams. By reason of the peculiar character of the action, we are unwilling to extend the rule heretofore laid down so as to allow punitive damages in this class of actions.

Petition overruled.

CASE 3—APPLICATION BY JOHN TRAYNOR AGAINST J. C. W. BECKHAM (GOVERNOR) TO COMPEL THE ISSUANCE OF A COMMISSION TO HIM AS POLICE JUDGE OF NICHOLASVILLE.—JUNE 11.

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Traynor v. Beckham, Governor.

APPEAL FROM FRANKLIN CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

POLICE JUDGES—VACANCIES—APPOINTMENT—CITY COUNCIL—POWERS—GOVERNOR—MINISTERIAL DUTIES—MANDAMUS.

Held: 1. Constitution, section 152, provides that vacancies in all offices for the State at large, or districts larger than a county, shall be filled by appointment of the Governor, and that all other appointments shall be made as prescribed by law. Kentucky Statutes, section 3551, declares that if a vacancy shall occur in any office which the city council has the right to fill by appointment, such vacancy may be filled by it for the remainder of the unexpired term; and section 3552 provides that if a vacancy shall occur in any elective office, including the office of councilman, such vacancy shall be filled by the council, subject to the provisions of the Constitution. Section 3758 requires the Governor to issue commissions to certain officers, and provides that should a vacancy in any of such offices occur where there is no provision of law for filling the same, the vacancy shall be filled by the Governor. HELD, that since Kentucky Statutes, section 3510, provides that the office of police judge of a city may be filled by election or by appointment of the council, as it may determine by ordinance, where a vacancy occurred in the office of police judge the city council had authority to fill the same under sections 3551, 3552.

2. Under Kentucky Statutes, section 3758, providing that police judges shall have commissions issued to them by the Governor, where a police judge was legally appointed by a city council to

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fill a vacancy, the Governor was under a ministerial duty to the appointee to issue such commission.

3. Where the Governor of a State refused to perform the ministerial duty of issuing a commission to a police judge legally appointed by a city council, as required by Kentucky Statutes, section 3758, mandamus was maintainable against the Governor to compel the issuance of such commission.

N. L. BRONAUGH, ATTORNEY FOR APPELLANT.

The question presented in this appeal is, "Has the Franklin Circuit Court jurisdiction to grant a writ of mandamus, to be issued against the appellee, as Governor of Kentucky, commanding him to issue a commission to appellant authorizing him to enter upon and discharge the duties, exercise the powers and receive the emoluments of the office of judge of the police court of Nicholasville."

That the circuit court being a court of general jurisdiction, has jurisdiction to grant the writ, is affirmed by the appellant.

The allegations of the petition for the purpose of the special demurrer being admitted, and also being admitted sufficient to authorize the issuing of the writ, except for the sole reason that the appellee is the Governor of the State.

The jurisdiction of the court is denied by appellee solely on the ground that he is Governor of the State.

That the Governor of a State in common with other executive officers in the exercise of those powers and duties confided to their discretion by the Constitution and laws of the State, is independent of the supervision of the judiciary, and can not be coerced or controlled by the writ of mandamus is conceded.

That he is amenable to the compulsory process of the courts by the writ of mandamus in the performance of purely ministerial duties imposed on him by the statute, which might have been imposed on some other officer, and which affect any specific private right is maintained by the courts of some of the States, and denied by the courts of some of the other States can not be questioned.

In so far as I have been able to ascertain the Kentucky Court of Appeals has never decided this particular question; that is, as to whether the Governor is subject to this writ, in a case where the Governor was a party. But the principle upon which the writ is issued has been decided in a number of cases.

It will be my effort to consider the question, in the light of the Kentucky authorities, and Kentucky laws applicable thereto, and if possible reach a conclusion based upon the law as it exists in this State, and in the light of reason, without calling in assistance from the outside.

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The only writ of mandamus that we know of in this State is defined in section 477 of the Civil Code as being "an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or to omit to do an act, the performance or omission of which is enjoined by law," and is granted on the motion of the party aggrieved.

The Governor, by reason of his office, is the chief executive officer of the State, and there is no amendment of section 477 of the Code adding the words, "Excepting the Governor of the Commonwealth of Kentucky" after the word "Executive."

And the word "executive" being generic in its application, I believe I am justified in my conclusion that the Governor is at least one of the executive officers referred to in that section.

But the Governor in common with other officers of his department has two classes of duties to perform. One class is composed of those which are governmental or political in their nature, which pertain and adhere to his office, as a part of it, and as to which he has an inherent right to exercise his personal judgment and discretion in their performance. In the exercise of these duties, the Governor can not be coerced or controlled by the courts.

The other class is composed of those duties which have been imposed on the Governor by some specific statute, directing him to do some certain thing, which does not, by nature, or under the theory of our Government, pertain or adhere to the office of the Governor, but which are purely ministerial in their nature and character, and which might just as well have been imposed upon some other officer. These duties are simply ministerial, about which he has no discretion, and about which he has no judgment to exercise; as to these duties, while he is the official head of the executive department, he is simply a ministerial officer. Thus in the exercise of the duties of his office he acts both in the character of an executive and ministerial officer, and considered in this light, section 477 of the Code refers especially and particularly to him.

But notwithstanding the broad and comprehensive generic terms used in this section appellee claims that because he holds the office of Governor of the Commonwealth of Kentucky, he is exempt from this process of the court.

As one of the first principles upon which our free republican form of Government is based we have from its inception in the Declaration of Independence down to our present State Constitution declared and maintained that all men are by nature free and equal. Equal, in what? Socially? No. Mentally? No.

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Physically? No. Equal in what? Equal before the law? Yes, that is what it means.

Then if all men are equal before the law the appellant in this case is the equal of the appellee before the law. And if the appellee has placed himself in the position of refusing to perform a service for the appellant to which appellant is entitled, and which the appellee under the terms of the statute must perform, then the appellant has the right to apply to a court of competent and original jurisdiction to determine his right, and that court has jurisdiction to issue any process within its province to command and enforce the performance of the duty, it matters not who the person is against whom the order is to issue, or what office he may hold.

The law applies to all alike. No man or officer is above the law. And no exclusive privilege shall be granted to any man or set of men, except in consideration of public services. And even under the exception it must be done by special enactment.

It can not be claimed in this State that the Governor is exempt from the compulsory mandamus of the courts by reason of anything in the law as it is written, for there is no exemption or exception in favor of the Governor.

AUTHORITIES CITED AND RELIED ON.

Civil Code, sec. 477; Bruce v. Fox, 1 Dana, 447; Justices of Jefferson County v. Clark, 1 Mon., 86; Page, Second Auditor, v. Hardin, 8 B. Mon., 648; Steele, Mayor, &c. v. Willis, &c., 23 Ky. Law Rep., 826; City of Lebanon v. Creel, 22 Ky. Law Rep., 865; Duncan v. Mayor of Louisville, 8 Bush, 106; Constitution, secs. 152, 160 and 84; Ky. Stats., secs. 3510, 3551, 3552 and 3758; Marbury v. Madison, 1 Cranch, 137; Kendall v. United States, 12 Peters, 524; Decatur v. Paulding, 14 Peters, 497; Guthrie v. United States, 17 How., 284; Seaman v. United States, 17 How., 225; Reeside v. Walker, 11 How., 289; Schurtz v. United States, 102 U. S., 378; Butterworth v. United States, 112 U. S., 50; United States v. Black, 128 U. S., 40; United States v. Windom, 137 U. S., 636; United States v. Blaine, 139 U. S., 306; Roberts v. United States, 176 U. S., 228; State v. Thayer, 31 Neb., 82; Martin v. Ingram, 38 Kan., 641; Middleton v. Low, 30 Cal., 596; Harpending v. Haight, 39 Cal., 189; Tenn., &c., R. R. v. Moore, 36 Ala., 371; Magruder v. Swann, 25 Md., 173; Groome v. Gwinn, 43 Md., 572; Chumasero v. Potts, 2 Mont., 242; State v. Blasdel, 4 Nev., 241; State v. Chase, 5 Ohio St., 528; Greenwood, &c., Land Co. v. Routt, 17 Col., 156; 31 Am. St. Rep., 294; Civil Code, secs. 152-477.

And the dissenting opinions in State v. Governor, 17 Fla., 67, and Hartranft's Appeal, 85 Pa. St., 433 (27 Am. Rep., 667, &c).

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A. O. STANLEY, ATTORNEY FOR APPELLEE.

(No brief in the record for appellee.)

On petition for rehearing by appellee, C. J. Pratt, Attorney General filed the following suggestions.

The appellee, J. C. W. Beckham, comes and says that in the court below he filed a general demurrer and a special demurrer to the plaintiff's petition; that on the hearing of said action the court below sustained the special demurrer to said petition on the ground that the court had no jurisdiction of the defendant.

It logically followed that the question presented on the appeal was whether the circuit court had jurisdiction to grant the writ of mandamus. The allegations of the petition for all the purposes of the demurrer were admitted as true. The jurisdiction of the court was denied to the appellant solely on the ground that the appellee was Governor of the State, and that he was not amenable to the compulsory process of the court or its writ of mandamus.

In the able opinion of this court it is said that three questions are presented on this appeal: (1) Did the board of council have the right to make the appointment? (2) Was it the duty of the Governor under the law to issue the commission? (3) Have the courts authority to issue a mandamus against the Governor to compel him to issue the commission?

By section 150 of the Constitution it is provided: "Vacancies in all offices for the State at large, or for districts larger than a county, shall be filled by appointment of the Governor; all other appointments shall be made as may be prescribed by law."

By this provision of the Constitution authority is conferred upon the Governor to fill all vacancies for the State at large, or for districts larger than a county. Vacancies in other offices shall be filled as prescribed by law. The statutes in reference to filling such vacancies may be found in sections 3551, 3552 and 3758, Kentucky Statutes.

In the opinion in this case the court held that as the board of council had provided by ordinance for the appointment of a police judge that when a vacancy occurs the said board had the power to fill it by appointment for the remainder of the term That section 3758 Kentucky Statutes only authorizes the Governor to fill a vacancy in the office of police judge,, "where there is no provision of law for filling the same."

We may reasonably conclude from the language of this opinion that the Governor would have the right to fill a vacancy in the

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office of justice of the peace, and other offices mentioned in section 3758—except the office of police judge, which may be filled as provided in sections 3551 and 3552, Kentucky Statutes—but as these questions so often come before the Governor, and it is important for the due execution of the law that he be safely guided on this question, we respectfully ask the court to modify the opinion or broaden the same so as to clearly define the duties of the Governor in filling the appointments of officers other than the office of police judge.

OPINION OF THE COURT BY JUDGE PAYNTER.—REVERSING.

In March, 1903, a vacancy occurred in the office of police judge of Nicholasville, a city of the fourth class, by the death of the incumbent, T. B. Crutcher. On the 20th of that month the board of council appointed the appellant, John Traynor, to fill the vacancy, and issued to him a certificate of appointment. On the 23d of the same month it was presented to the Honorable J. C. W. Beckham, with the request that he, as Governor of the Commonwealth of Kentucky, issue to him a commission authorizing him to enter upon the discharge of the duties of the office to which he had been appointed. The Governor declined to issue the commission. This action was instituted by the appellant against the appellee, asking that a mandamus be issued to compel the Governor to issue a commission to him.

Three questions are presented on this appeal: (1) Did the board of council have the right to make the appointment? (2) Was it the duty of the Governor under the law to issue the commission? (3) Have the courts authority to issue a mandamus against the Governor to compel him to issue the commission?

Among other provisions, section 152 of the Constitution contains the following: "Vacancies in all offices for the State at large, or for districts larger than a county, shall be filled by appointment of the Governor; all other appointments shall be made as may be prescribed by law."

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It will be observed that by this provision of the Constitution the exclusive authority is conferred upon the Governor to fill vacancies in all offices for the State at large, or for districts larger than a county. Vacancies in other offices shall be filled as prescribed by law, which means in such manner as the General Assembly may provide. Section 3551, Kentucky Statues, reads as follows: "If a vacancy shall occur in any office which the board of council has the right to fill by appointment, such vacancy may be filled by the board for the remainder of the term of such vacant office." Section 3552 reads as follows: "If a vacancy shall occur in any elective office, including the office of councilman, such vacancy shall be filled by the board of council, subject to the provisions of the Constitution applicable thereto. If the election of any elective officer in cities of this class be contested, such contest shall be conducted and determined as provided by law in cases of the election of county officers." The office of police judge may be filled by election or by appointment of the board of council, as the board may determine by ordinance. Section 3510, Kentucky Statutes. Where the board of council shall have provided by ordinance, as required by section 3510, for the appointment of police judge, then, under section 3551, if a vacancy occurs, the board of council may, by appointment, fill it for the rest of the term. If it is made elective, then the board of council is authorized to fill it subject to the provisions of the Constitution applicable thereto. Whether the office of police judge is filled by election or by appointment, if a vacancy occurs therein, it is to be filled by the board of council. Sections 3551 and 3552 were enacted subsequent to section 3758, which reads as follows: "The following officers shall have commissions issued to them by the Governor, that is to say, secretary of

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state, register of the land office, auditor of public accounts, treasurer, commissioner of agriculture, labor and statistics, superintendent of public instruction, judges of the court of appeals, clerk of the court of appeals, judges of the circuit courts, county judges, police judges, railroad commissioners, Commonwealth's attorney, justices of the peace, notaries public, and all officers of the militia of rank and grade higher than and including the rank and grade of captain. Should a vacancy occur in any of said offices, by reason of the death, resignation or removal of the officer, or from any other cause, or should a like vacancy occur in any other office where there is no provision of law for filling same, such vacancy shall be filled by the appointment of the Governor, subject to the provisions of the Constitution applicable thereto." As sections 3551 and 3552 provide for the filling of a vacancy in the office of police judge, they control, because section 3758 only authorizes the Governor to fill a vacancy in the office of police judge "where there is no provision of law for filling the same." It follows, therefore, the board of council had the right to fill the vacancy.

When a police judge has been duly appointed or elected, it is made the duty of the Governor, by section 3758, to issue such one a commission authorizing him to enter upon the discharge of the duties of the office; for it is written in that section that certain officers (including police judges) "shall have commissions issued to them by the Governor."

The third and last question involved is more delicate and difficult of solution. It is one upon which the supreme courts of the States of the Union hold widely divergent opinions, which have been expressed in a plausible, scholarly and forceful manner. These differences of opinion result from the fact that our national and State govern-

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ments are divided into judicial, legislative and executive branches. To maintain the independence and efficiency of each, one must not usurp or encroach upon the rights of the others. Each must steadfastly pursue its constitutional and other duties with due regard and consideration of the other branches of government. In the matter of enacting laws, the legislative department is supreme, and the other branches must obey them. It is the business of the executive department to enforce the laws thus enacted. To determine whether legislative enactments are violative of the organic law, to interpret the laws, and decide controversies is the peculiar province of the judiciary. It is no encroachment upon the rights of the Congress for the Federal courts to determine whether or not its enactments are constitutional. Those courts time and again have done so. Neither is it an encroachment upon the rights of the legislative branch of State governments for their courts to declare legislative acts to be in violation of State constitutions. State courts frequently do so. The assertion of individual rights often calls in question the validity of legislative enactments, and the courts never allow an unconstitutional enactment to stand in the way of the enforcement of such rights. This court has likewise had in review executive acts in determining the rights of individuals, and has not failed to determine whether they were valid or invalid. In Bruce v. Fox, 1 Dana, 447, the court decided the act of the Governor in appointing Horatio Bruce Commonwealth's attorney to be void. In Justices of Jefferson County v. Clark, 1 T. B. Mon., 86, it held the appointment by the Governor of a justice of the peace to be void. In Page v. Hardin, 8 B. Mon., 648, the court held invalid the act of the Governor declaring a vacancy in the office of the Secretary of State, and appointing another to fill it. The courts regard

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that they are acting within their appropriate sphere under our system of government when they pass upon the constitutionality of an act, or declare upon the validity of an act of the executive department. In those cases the court did not pretend to have direct control over the action of the legislative or of the executive departments. They passed upon the validity of the act affecting private rights. Attention has been called to instances of the exercise of judicial power over legislative and executive acts to show that the judiciary has in certain cases reviewed and held void such acts.

We pass from the general observations to the question more directly before us. The supreme courts of some of the States have held that a mandamus will not lie to compel a Governor to perform a ministerial act imposed by law, refusing to discriminate between those duties which are governmental and political in their character, involving discretion and judgment, and those which are ministerial, in the performance of which no judgment or discretion need be exercised. The supreme courts of other States discriminate between those duties which are governmental or political in their character, involving discretion and judgment, and those which are ministerial, in the performance of which no judgment or discretion need be exercised. In the latter view we concur. All courts agree that a mandamus will not lie against a Governor to compel the exercise of governmental, political, or discretionary powers. In Page, Second Auditor, v. Hardin, 47 Ky., 648, the court said: "Where, by the Constitution or by the law, the Governor has a discretionary power, or where on any ground his act is made conclusive as to all rights involved, it is, of course, not within the province of a court to inquire into the propriety or impropriety of the act. Such a power

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controls all rights which it may affect, and a properly authenticated act done in pursuance of it can not be questioned, for the reason that there can be no legal right coming in conflict with it. Rights dependent upon a discretionary power can not exist in opposition to it, but terminate at its will. The question, however, whether there is such a power in a given case, or whether any particular power or act is of the character referred to, is a judicial question, whenever the right in litigation before a judicial tribunal depends upon it and requires its decision." When the law imposes a duty on the chief executive of a State, which is ministerial in character, involving neither discretion nor judgment, a mandamus will lie to compel him to perform it. Section 477, Civil Code, reads as follows: "The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law; and is granted on the motion of the party aggrieved, or of the Commonwealth when the public interest is affected." The language of the Code embraces all ministerial and executive officers. The Governor is not excepted from its operation. No man is or should be above the law. That he should not be is in accord with the spirit of a republican form of government. There is no royal prerogative or official position in this country which exempts one from yielding obeisance to the law. There is nothing in the Constitution which forbids the suing of the Governor. While courts can not control executive acts of the Governor, or executive powers conferred upon him, yet they can control ministerial powers. Ministerial power is certainly inferior to judicial power. If one officer can be controlled in its exercise, why not another? It may be conferred up-

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on one person as well as another. Whether it be conferred upon a Governor of a State, or some minor official is the recipient of it, the exercise of it does not require the exercise of judgment or discretion any more by the one than the other. The question as to whether a mandamus will lie is not determined by the office of the person against whom it is sought, but the nature of the thing to be done. In Marbury v. Madison, 1 Cranch, 170, 2 L. Ed., 60, the court said: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." It is no more an invasion of the executive department whether the writ be issued against the chief executive than it is when issued against a subordinate executive officer. The difference is only in degree, not in principle. In Great Britain the king is sued, and it is said he always complies with the judgment of the court. The State and Federal Governments are governments of laws, not of men. The citizen only gets the shadow of civil liberty, not in its essence, when he has a legal right and is denied the right to enforce it. The greatest duty of government is to afford such redress. In Kendall v. United States, 12 Pet., 610, 9 L. Ed., 1181, the court recognized the doctrine stated by Chief Justice Marshall in Marbury v. Madison, and said: "The mandamus does not seek to control the Postmaster General in the discharge of any official duty partaking in any respect of an executive character, but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control. . . . There are certain political duties imposed upon many officers in the executive department, the discharge of which are under the direction of the President. But it would be an alarming doctrine that Con-

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gress could not impose upon an executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grows out of and is subject to the control of the law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character. The law relating to mandamus against a public officer is well settled in the abstract, the only doubt which arises being whether the facts regarding a particular case bring it within the law which permits the writ to be issued, where a mere ministerial duty is imposed upon the executive officer, which duty he is bound to perform without any further question. If he refuse under such circumstances, mandamus will lie to compel him to perform his duty." In Page v. Hardin, the court said: "There can be no reasonable ground for denying it the power and duty of declaring upon the legal validity of any act of the executive department, whether done by an inferior or by the supreme executive officer. The executive department and all its officers are as much bound by the constitutional laws as the legislative, and have no more power to violate the rights of individuals secured by the laws. The power, obviously judicial, of ascertaining and enforcing the legal rights of individuals, is, in effect, the power of protecting those rights from violation by the act or authority either of individuals or of the legislative or executive departments; and it necessarily involves the function of deciding, in every case properly before it, what are the legal rights of the parties, and how far in point of law—that is, under the constitution and laws—those rights have been affected by any and every act relied on for their support or destruction." In United States v. Blaine, 139 U. S., 306-319, 11 Sup. Ct.,

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607, 35 L. Ed., 183, the court said: "The writ of mandamus can not lie in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. When, by special statute or otherwise, a mere ministerial duty is imposed upon the executive officers of the government—that is, a service which they are bound to perform without further question—then, if they refuse, the mandamus may be issued to compel them."

By some of the courts which hold that a mandamus will not lie it is urged that, if the Governor opposes the judgment of the court, it can not be enforced, because he has entire control of the militia. A court should not anticipate that the Governor will not obey its judgment. If there was a well-grounded fear that a Governor would resist the enforcement of the judgment, that should not excuse the court for a failure to perform its duty by adjudging to an individual the rights which the law of the land vouchsafed to him. By some courts it is urged that the only relief that can be obtained is by impeachment or an appeal to the electors. These courses may result in the removal of the Governor from office, or in supplanting him by another, but it absolutely gives no relief to the individual whose rights have been invaded or denied. He can only appeal to the judiciary for the protection of his individual rights. The public may have recourse to other remedies. On the general question of the rights of the judiciary to compel executive officers by writ of mandamus to perform ministerial duties, we quote with approval from the dissenting opinion of Chief Justice Agnew in Hartranft's Appeal, 85 Pa., 433, 27 Am. Rep., 667. He said: "It is said the Governor is the representative of the people, and therefore not responsible. This is true of executive duties, for therein

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the Constitution, the adopted will of the people, is his warrant of authority; but it is untrue of judicial powers, for therein the judiciary represents the people by the same warrant of authority; and, if he violate the law, which it is the province of the judiciary to enforce by their authority, he is liable to the law. In a government of law instituted by a free people for their own benefit, there is no royal prerogative to do anything wrong, and therefore there can be no representation of their dignity, such as can strike down their law, and prevent its administration by its appropriate functionary." The court is of the opinion that the act of issuing the commission which is enjoined by the law is purely ministerial, and the writ of mandamus will lie to compel the Governor to perform it.

This opinion is not predicated upon the idea that the Governor does not desire to comply with the statute, but to announce the rule which the judiciary will follow. The Governor only desires to be advised as to the proper interpretation of the statute, and, when interpreted, will cheerfully discharge his duty under it.

The judgment is reversed for proceedings consistent with this opinion.

Judges O'Rear and Barker dissent from so much as awards a mandamus.

The court delivered the following response to the appellee's petition for rehearing:

From the conclusion of the court in Daugherty v. Arnold, 110 Ky., 1, 22 R., 1504, the Governor has authority to fill vacancies in the office of justice of the peace by appointment.

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CASE 4—ACTION BY H. B. HUELEFELD AGAINST M. D. MCINERNEY, SHERRIFF OF KENTON COUNTY, TO ENJOIN THE COLLECTION OF CERTAIN TAXES.—JUNE 11.

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124 472

McInerney, Sheriff, v. Huelefeld.

APPEAL FROM KENTON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS.—REVERSED.

COUNTIES—DIVISION INTO JUSTICES' DISTRICTS—UNFAIR APPORTIONMENT—EFFECT—TAXATION—ENJOINING LEVY—NECESSITY FOR LEVY—PURPOSES OF LEVY—ORDER RECITING SAME—GOVERNMENT PURPOSES—SEPARATION OF CITY FROM COUNTY—ACTS OF LEGISLATURE—REPEAL.

1. The fact that the commissioners appointed to divide a county into justices' districts only alloted to a city in the county two magistrates, while five were allotted to the county outside of the city, notwithstanding that the city greatly exceeded the rest of the county in both wealth and population, was not ground for enjoining, at the suit of a private citizen resident in the city, a tax, levied by the fiscal court of the county, which is composed of the county judge and magistrates, where no exception was taken to the confirmation of the report of the commissioners, nor any attempt made to procure a reapportionment four years later, as authorized by Kentucky Statute, 1899, section 1082.
2. So long as municipal governments make levies of taxes within the limits prescribed by the Constitution, courts of equity will not inquire into the necessity of the levy at the suit of an individual taxpayer.
3. The resolution of the fiscal court of a county levying a tax of 38 cents on the $100, which recited that it was apportioned as follows: "Three cents for the purpose of creating a sinking fund with which to purchase a poor farm and erect suitable buildings thereon, ten cents for the maintenance and repair of the public roads and bridges of the county, and twenty-five cents to defray the general county expenses"—specified the purposes of the levy with sufficient distinctness.
4. There is nothing in the various special acts relating to the city of Covington to indicate an intention to separate the city from the county of Kenton for governmental purposes.
5. The various special acts relating to the city of Covington were

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repealed by the general act of October, 1892, which was passed in conformity with the mandate of the Constitution requiring uniformity and prohibiting special legislation.

FRANK M. TRACY AND HERBERT JACKSON, FOR APPELLANT.

(No brief for appellant.)

W. S. PRYOR, FRANK M. TRACY AND HERBERT JACKSON, FOR APPELLEE.

The amount involved in this case is but trifling compared with the consequences that must necessarily follow in the event the injunction in this case is dissolved, or the property within the city of Covington and its owners made liable to support and maintain, in effect, both the municipality of Covington and the county of Kenton.

The taxable property outside of the city of Covington is valued at nine millions of dollars, the property within the city limits at twenty-two millions. So, with the imposition of a tax of thirty-eight cents on the $100, the burden on the taxpayers of Covington would be $77,600, and on the taxpayers of the county, $34,200. Ten cents of this tax is for roads and bridges and three cents for building an infirmary, and when the taxpayer is called on to pay his portion of the expense of the city government in addition to the taxes for the county, his income, unless he is a man of great wealth, is swept from him by the taxgatherer for the support of these two governments.

It may be regarded as a fact conceded—and if not, the history of the two governments shows it—that from the time the municipality of Covington was created up to the time of the decision rendered by this court in the case of Richardson v. Boske in the year 1891, the two governments were kept distinct and separate as far as could be, each one paying its own expenses and no clamor made by the one side or the other that the taxation was either unjust or oppressive. In the year 1836, an amendment to the original charter of the city of Covington was passed, providing that after the first day of November, 1836, the citizens of Covington should be exempt from the assessment of the county levy and all charges for roads and other purposes. The magistrates in the city of Covington were not allowed to preside in the court of claims, and act after act was passed exempting the city population from the payment of any part of the burden necessary to run the county government. In March, 1886, it was provided that "all expenses and costs of every character and kind growing out of county or municipal government, which are or have been payable out of the county levy, which originate in the city

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of Covington in the county of Kenton shall be paid by the city of Covington, and all expenses of every character and kind which originate in the county of Kenton, outside of the city of Covington, shall not be paid by the city of Covington; *Provided*, That the allowance to county officers for services rendered as such for the county of Kenton, that the city of Covington shall only pay its proportionate part of the allowance."

This enactment was evidently passed by the consent of both the city and the county, and for the purpose of having a complete and perfect contract in the form of this enactment settling the rights of these parties; and in order to carry such contracts into effect, when the present Constitution was adopted section 144 provided for the election of three commissioners, who should act as a substitute for what is now termed the fiscal court, providing that where, for governmental purposes, a city is by law separated from the remainder of the county such commissioners may be elected from the part of the county outside of the city. The taxpayers of the county, recognizing the equitable adjustment of this matter, elected commissioners that it might, in good faith, carry out this agreement.

The case of Richardson v. Boske, reported in 23 R., page 1212, 111 Ky., 893, the opinion delivered by the present chief justice, seems to have been misconceived, in its effect at least, by one of the parties connected with this controversy, and is now relied on as conclusive of this case. The chief justice had before him the various acts of the Legislature on the subject, and evidently gave to the questions presented very careful consideration, and, we maintain, in no wise held that the legislative contract, by which the rights of the two governments were fully settled, had been repealed, but on the contrary was careful to say that it was not necessary for the court to pass on that question. It is now an open one, and whether the fiscal court is composed of the magistrates or the three commissioners is immaterial, the statutory contract must be observed. We perceive no reason, and none has been assigned, why the Legislature at the time these acts were passed had not the right to make provisions by which the expenses incurred by these two governments should be fairly adjusted and upon terms that would not oppress the one or the other.

It is apparent from the record before us as to the manner in which these taxes are imposed, that the city is at the mercy of the county magistrates; and with the city liable for any and all appropriations made by these magistrates, it is manifest that the burden not only will, but has already, become onerous to the taxpayer, and such as he can not discharge. In fact these taxes in controversy, or the greater portion of them, have been

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levied for no particular purpose, or if for any specific purpose it has been confined, and is now to the recollection of the fiscal court that seems to have imposed the taxation. Why and for what purpose the taxes were levied does not appear, either by any written report or as a matter of record. All the magistrates know on the subject is that the taxes were levied for county purposes.

Section 1079 of the Kentucky Statutes provides: "The county judge of each county shall, in open court, on the first Monday in August, 1892, appoint three competent citizens of the county, over twenty-one years of age, and residing in different portions of the county and in different districts, as commissioners to divide the county into not less than three nor more than eight justices' districts, as nearly equal in territory and population as may be."

In following out this statute and attempting to comply with its provisions, a glaring error has been committed by these commissioners in this county, evidently upon the idea that they believed that the separation of the two governments still continued, and it was immaterial as to how the division was made, by giving to the county five magisterial districts and to the city only two. The population of the city from which the two justices came was three or four times that of the county, to which five had been assigned, and where business of a civil and penal nature was more likely to occur than in the county districts. So, as between the city and county, this heavy taxation is imposed by the minority on the majority; and while that report of division was confirmed it shows the necessity in such a state of case of spreading upon the records of the county court some evidence of the purposes for which these levies were made. In this case the purpose was not set forth by any written statement filed or made part of the county record, and the taxpayer is at a loss to know how this money raised by the levy has been expended. The evidence shows there was an increase in the levy of exceeding twenty per cent. over former years, and yet the citizen was denied the right of ascertaining why this heavy burden was placed upon him by this particular levy. Sixty thousand dollars necessary one year to pay the expenses of the two governments, and one hundred and fifteen thousand the next year, and yet the records of the county court, as well as every other court, are silent as to the expenditure and the objects of the extraordinary levy!

It results, therefore, as it seems to us, that the levy, certainly beyond the ten cents and the three cents, was absolutely void.

We can not well see why a legislative contract to which both parties assented is not as binding as any other. The rights of

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these parties had to be settled, and the Legislature was the only resort for the making of such a contract as would bind the parties, and if these various legislative provisions are disregarded and the contention of appellant prevails, there is no end to the taxation for those living within the city.

The imposition of taxes in all municipal governments within the State of Kentucky constitutes the chief cause of complaint with the citizens of the State who have property within the various municipalities. The expenses, as the court well knows, are enormous, and the municipal government is required to pay all of its officers to provide for its paupers, its public schools, with the salaries of its teachers and superintendent, and no mode of making payment but by the hand of the tax gatherer. The tax to maintain pest houses and poor houses, and to provide buildings for the court and clerk's offices, and also the jail, is as much for the benefit of the county as the city; we allude now to counties where cities are embraced within their boundaries.

The city of Covington is one of the county seats of the county of Kenton, kept up alone by the taxpayers of Covington, and when you tax him to pay four-fifths of the expenses of the county in addition to municipal taxation, he has the right to complain of this great burden, and a court of equity should interpose to see that justice is meted out to both of these litigants, and to this end it would be just and proper to require each government to live up to its legislative agreement. These acts have not been repealed. There has been no express legislation on the subject, and they have lived together so long in peace and harmony they should not be disturbed. The mere incidental benefits that may be derived by the one from the other ought not to be taken into account; but where the county attorney, or county judge, or other officer is elected by the whole people, both city and county, his salary should be paid in common; and in every other instance where direct benefits accrue and the voice of the taxpayer in both governments is heard, or can be heard, for or against.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

This action was instituted by the appellee, H. B. Huelefeld, a citizen and taxpayer of the city of Covington, against the appellant, M. D. McInerney, sheriff of Kenton county, to enjoin the collection of a tax of thirty-eight cents on each $100 of property in the county, which was levied by the fiscal court of Kenton county, composed of the coun-

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ty judge and seven magistrates, five of whom reside outside of the city of Covington, and two within the city limits, at the regular meeting of the fiscal court for that purpose in April, 1902, upon three grounds:

First, because the commissioners appointed pursuant to section 1079 of the Kentucky Statutes of 1899, to divide the county into justices' districts, only allotted to the city two magistrates, while five were allotted to the county outside of the city, notwithstanding the fact that the city greatly exceeded the rest of the county both in wealth and population. It appears from the record that in 1892 the county judge of Kenton county appointed three commissioners to divide the county into magisterial districts, and that they performed this duty in strict conformity with the provisions of section 1080 of the Kentucky Statutes of 1899, and that no exceptions were made to the division as made by them, and their report was regularly confirmed by the judgment of the Kenton county court at its January term, 1893, and so far as this record shows this apportionment has never been called in question in any way. If, as contended, this apportionment of the county into magisterial districts was unjust to the city of Covington, they could have filed exceptions to the confirmation of the report, and, in addition to this remedy, section 1082 of the statutes provides that the county may be reapportioned into justices' districts at any term of the court in the same way four years after the first apportionment. As the city of Covington has not complained of this apportionment in the manner pointed out by the statute, a court of equity can not regard it as a sound contention at the suit of an individual citizen to enjoin the collection of the tax assessed against him.

The next ground complained of is that the levy made by

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the fiscal court is in excess of the requirement of the county, and was not itemized in the manner required by law. Section 1839 of the statutes, which was passed in conformity with the requirements of section 157 of the Constitution, provides: "The fiscal courts shall have jurisdiction to levy each year for county purposes an ad valorem tax on all property subject to taxation within the county, whether belonging to natural persons or corporations, companies or associations, not to exceed fifty cents on each $100.00 in value thereof as assessed for State purposes." The tax complained of in this action is only for 38 cents on each $100 in value of taxable property in the county, and is therefore clearly within the limit. The law is well settled that, so long as municipal governments make levies of taxes within the limits prescribed by the Constitution, courts of equity will not undertake to inquire into the necessity of the levy at the hands of an individual taxpayer. See Mayfield Woolen Mills, etc. v. City of Mayfield, 111 Ky., 172, 22 R., 1676, 61 S. W., 43, where the question was recently and thoroughly considered by this court, and the conclusion there reached is supported by the overwhelming weight of authority on the question. See High on Injunctions (2d Ed.), section 544; Cooley on Taxation (2d Ed.), p. 372. Nor does the record sustain this contention of appellee as to the alleged excessive levy. And it does not bear out appellee's contention that the fiscal court did not specify with sufficient distinctness the purpose for which the levy was made. The resolution of the fiscal court on this point recites that 38 cents was apportioned as follows: 3 cents for the purpose of creating a sinking fund with which to purchase a poor farm and erect suitable buildings thereon, 10 cents for the maintenance and repair of the public roads and bridges of the county, and 25 cents

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to defray the general county expenses. The language of the resolution is in substantial compliance with the provisions of the State revenue act, which provides that an annual tax of 50 cents on each $100 of value on all property shall be levied for the following purposes: "Twenty-two and one-half cents for the ordinary expenses of the government; twenty-two cents for the schools; five cents for the sinking fund, and one-half of one cent for the A. and M. College." In our opinion, the levy was sufficiently definite.

The third and most important ground upon which appellee assails the levy is that the city of Covington is by law separated from the balance of the county of Kenton for governmental purposes, and that in consequence thereof the fiscal court of the county had no legal power or authority to levy a tax for county purposes upon the property of citizens living within the city of Covington; and incidentally to this contention it is insisted by appellee that the decision rendered by this court in the case of Richardson v. Boske, Sheriff, etc., 111 Ky., 893, 23 R., 1209, 64 S. W., 919, should be overruled. In that case Richardson, a citizen of Kenton county, residing outside of the corporate limits of the city of Covington, sought to enjoin Boske, the then sheriff, from collecting a tax which the magistrates of the county residing outside of Covington, assuming to be the fiscal court of the county, had levied on property located in the county outside of the city of Covington for the year 1899, for county purposes, on the ground that the magistrates residing in the city of Covington did not act as members of the fiscal court, which made the levy, and that the tax was therefore levied by an illegally constituted fiscal court. The sheriff resisted the granting of the injunction upon the ground that the city of Covington was separated from the

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residue of the county for governmental purposes, and was therefore not liable for any part of the tax sought to be enjoined, and that the magistrates residing within the city limits did not constitute any part of the fiscal court, and to support this contention relied upon certain special acts of the General Assembly running through a series of years, which exempted the citizens of Covington from any charge for maintaining the public roads of the county outside the city, and for other expenses for the maintenance and improvement of the county outside of the city, and are the identical acts relied on to support the contention of appellee in this proceeding. In that case it was not necessary for the court to decide whether the separation of the city of Covington from the residue of the county for governmental purpose actually existed by virtue of these acts or not, but the court did decide that in so far as they were inconsistent with or repugnant to the act of October, 1892, which is embraced in sections 1833 to 1851, inclusive, of the statutes, which define and prescribe the duties of fiscal courts, they were repealed by the concluding section of that act, and that the fiscal court consisted of the county judge and seven magistrates, and that as such they had the jurisdiction to appropriate county funds for all the purposes defined in section 1840 of the Kentucky Statutes of 1899, and to levy a sufficient tax, within the statutory limit, upon all the property within the entire county, whether located inside or outside of the city of Covington, for this purpose. The decision in the case of Richardson v. Boske, Sheriff, has been referred to and approved by this court in quite a number of cases which have since been decided. See Campbell County v. Newport & Cincinnati Bridge Co., 22 R., 2056, 66 S. W., 526; City of Covington v. Highlands District, 113 Ky., —, 24 R., 433, 68 S. W., 669; Commonwealth v. Porter,

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113 Ky., 575, 24 R., 364, 68 S. W., 621, and Johnson v. Boske, 23 R., 1845, 66 S. W., 400. And that case followed the rule which had been previously announced in Campbell County v. Commissioners, etc., 19 R., 860, 42 S. W., 111, and Joyes v. Jefferson Fiscal Court, 106 Ky., 615, 21 R., 199, 51 S. W., 435. And we still adhere to the law as therein announced. In addition we will say that there is nothing in these various special acts which sustain the contention that the General Assembly intended thereby to separate the city of Covington from the county of Kenton for governmental purposes. They are in no sense contracts between the city and State. The General Assembly always had the power to repeal them when they saw fit, and did so by the general act of October, 1892, which was passed in conformity with the mandate of the Constitution requiring uniformity and prohibiting special legislation. The city of Covington maintains its separate municipal government like every other city in the Commonwealth, and in addition thereto permits the use of its city courthouse by the circuit court while it is holding its session within the city. But there is nothing to support the contention of a separation between the city and county for governmental purposes. On the contrary, the county government is administered by county officers, who are elected by the entire county, and whose jurisdiction extends over the entire county, including the city of Covington.

The General Assembly has plenary power to create counties, and it can not be doubted that, if they had intended to establish a separate county government in the city of Covington, they would have done so in a clear, explicit and unequivocal act passed for that purpose. In our opinion, the contention rests upon no substantial basis and can not be maintained.

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For reasons indicated, the judgment is reversed and cause remanded, with instructions to dissolve the injunction granted by the circuit judge, and for an order dismissing plaintiff's petition, with costs, and for such other proceedings as may be necessary to carry out the views indicated in this opinion.

Petition for rehearing by appellee overruled.

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CASE 5—ACTION BY WARREN DEPOSIT BANK AGAINST LUTHER R. PORTER AND THE FIDELITY & DEPOSIT CO., OF MARYLAND, ON A BOND GIVEN BY SAID DEFENDANTS AS PRINCIPAL AND SURETY.—JUNE 12.

Warren Deposit Bank v. Fidelity & Deposit Company of Maryland.

APPEAL FROM WARREN CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS.—AFFIRMED.

GUARANTY—FIDELITY BOND—APPLICATION—FALSE REPRESENTATIONS—RATIFICATION—APPEAL—PEREMPTORY INSTRUCTION.—WHEN SUSTAINED.

Held: 1. The trial court's action in granting a peremptory instruction will be sustained if such instruction should have been given for any reason apparent from the record.

2. Where a bank seeks to avail itself of the benefit of the actions of its president in securing the execution of a bond guarantying the fidelity of its cashier, it must accept such actions subject to the president's representations inducing the execution of the contract by the surety.

3. A bank, in accepting its president's action in procuring a bond guarantying the fidelity of its cashier, must be held to have assented to the conditions of the bond providing that the representations made by the president relative to the duties and accounts of the cashier should constitute an essential part and form the basis of the contract.

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4. Kentucky Statutes, 1899, section 639, providing that all statements or descriptions in an application for insurance shall be deemed representations, and not warranties, and shall not prevent a recovery on the policy unless fraudulent or material, does not alter the vitiating effect of a materially false representation.
5. Where representations in an application for an employe's fidelity bond are material and false, the bond was invalid, and whether they were fraudulent or not was immaterial.

C. U. McELROY AND LEWIS McQUOWN, FOR APPELLANTS.

POINTS AND AUTHORITIES.

1. The principles applicable to private suretyship for friendship or accommodation do not apply to the contract of guaranty suretyship. Sup. Council Cath. K. of A. v. Fidelity & C. Co., 63 Fed. 58; Guaranty Co. v. M. S. Bank & Trust Co., 80 Fed. 773.

2. The contract of guaranty suretyship is an insurance contract and the rules for the construction of insurance policies apply. Tebbetts v. Mer. Credit Guaranty Co., 73 Fed. 97; People v. Rose, 51 N. E. 245; Frost's Guaranty Insurance, pp. 15, 68.

3. These contracts must be construed most strongly against the company. Pauley v. Am. Surety Co., 170 U. S. 133; Guaranty Company v. M. Sav. & Trust Co., 80 Fed., 766; Lombard Inv. Co. v. Am. Surety Co., 65 Fed. 476.

4. Making a statement as to the conduct and fidelity of an employe of a bank to enable him to obtain a bond is not within the powers of a bank president. Wheat v. Bank, 9 Ky. Rep., 738; Am. Surety Co. v. Pauley, 170 U. S. 156.

5. Where a guaranty insurance contract omits to provide a forfeiture for failure to give notice of default the court will not imply the forfeiture. Kenton Insurance Company v. Downs, 90 Ky., 236; Am. Cen. Insurance Co. v. Heaverin, 18 Ky. Rep., 190; Carpenter v. German Am. Ins. Co., 52 Hun. 249; Peninsular Land Co. v. Franklin Ins. Co., 35 W. Va., 667; Sun Mut. Ins. Co. v. Mattingly, 77 Texas, 162; Cov. Ins. Asso. v. Evans, 102 Penn. St. 281; McGannon v. Mich. M. M. Fire Ins. Co., 54 L. R. A., 739.

6. When it is doubtful whether a provision of the policy was intended as a condition precedent to recovery the court will lean against such a construction. First National Bank v. Hartford Fire Ins. Co., 95 U. S., 673.

7. A "provision" in a contract is not necessarily a condition. It is merely a stipulation. 23 A. & E. Ency. L., p. 290 (2d Ed.).

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FAIRLEIGH, STRAUS & FAIRLEIGH, FOR APPELLEE.

ST. JOHN BOYLE AND SIMS & GRIDER, OF COUNSEL.

STATEMENT.

This action was brought in the Warren Circuit Court by the Warren Deposit Bank (hereinafter, for brevity, called the Bank) against Luther R. Porter and the Fidelity & Deposit Company of Maryland (hereinafter, for brevity, called the Surety Company), upon a bond given to the bank by Luther R. Porter as principal, and the surety company as his surety, conditioned that the surety company should, within three months after the receipt of satisfactory proof, reimburse the Bank to an amount not exceeding twenty thousand dollars for such pecuniary loss of money, securities or other personal property belonging to the bank as the bank might sustain by any fraudulent act or acts committed by Porter in the performance of the duties of cashier of the bank during the term beginning May 1, 1900, and ending May 1, 1901. The bond was dated May 1, 1900. Issue was joined and upon the trial, on motion of the surety company, the court, at the conclusion of the evidence for the plaintiff, peremptorily instructed the jury to find for the defendant, the surety company. Accordingly the jury so found and a judgment was entered dismissing the petition as to the surety company, and from that judgment this appeal is prosecuted.

The bank was incorporated in 1867 and organized for the conduct of its business in 1868. Luther R. Porter became the cashier of the bank in 1888, and continued to act as such until and for about eight months after the making of the bond sued on. When he first became cashier of the bank he gave a bond to the bank in the penal sum of twenty thousand dollars, for the faithful discharge of his duties as cashier, upon which certain individuals were sureties. This individual bond was not limited as to the time it should run, and continued during the entire time of Porter's cashiership. Some time before May 1, 1900, Porter was requested by the bank to give an additional bond, and on that date the bond sued on was made.

The petition avers the fact that Porter was cashier of the bank, the execution of the bond and its terms, and then avers the breach of the bond as follows:

"That while the said bond was in full force and effect, and within the term beginning May 1, 1900, and ending May 1, 1901, the plaintiff suffered pecuniary loss by reason of the fact that the defendant, Luther R. Porter, fraudulently and unlawfully, while acting as cashier aforesaid, and in violation of his duties as such cashier, embezzled, appropriated and used twenty thou-

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sand ($20,000.00) dollars of the money of the plaintiff, and fraudulently failed and refused, upon demand, to pay the same, or any part thereof, to plaintiff, or, in whole or in part, to reimburse the plaintiff for said loss, or to any one for its use and benefit.

The petition further avers that proof of loss was made to the surety company on February 4, 1901, and, notwithstanding this fact, that the surety company and Porter failed and refused to reimburse the bank, wherefore it prays judgment in the sum of twenty thousand dollars.

It is to be observed that the petition gives no detail of the alleged embezzlement, no items or dates. The plaintiff was in possession of all the books of account; nevertheless the averment is broadly, without any sort of detail, that the cashier embezzled between May 1, 1900, and May 1, 1901, $20,000 of the funds of the bank.

A copy of the bond is filed with the petition. The bond did not undertake to guarantee the faithful performance of duty on the part of the cashier, but only to reimburse the bank for such loss as might come to it from fraudulent acts on his part. The exact terms are, "Reimburse the employer, to an amount not in excess of the penalty of this bond, for such pecuniary loss as the employer shall have sustained by any fraudulent act or acts committed by the employee during the continuance of this bond in the performance of the duties of his said office or position . . . of money, secureties or other personal property belonging to the employer, or for which the employer is responsible."

The defendant, Porter, answered, simply traversing the averments that he had embezzled the funds of the bank, and that loss had been sustained by the bank because of fraudulent acts on his part.

The answer of the surety company made the same traverse, and in addition the following affirmative pleas:

1. A general plea that the bond sued on was obtained by the plaintiff by fraud and covin, without stating any fact showing fraud in obtaining the bond. (Second paragraph.)

2. The third paragraph is a special plea of fraud in which are stated the details of the alleged fraud in obtaining the bond, viz.: That for more than a year before the making of the bond Porter, as cashier, had been making loans and advances of the money of the bank to several customers for the bank, among whom was the firm of Porter Bros., and which loans and advances were not made in the regular course of business upon notes or discounted bills appearing on the books of the bank, but were rep-

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resented only by memoranda or other evidence of indebtedness which were carried by Porter, cashier, as cash, and did not appear on the books of the bank. That whilst this was being done there never was at any time on hand in the bank, or in the hands of Porter, cashier, as much money as was shown by the books to be in the bank, or in the hands of its cashier. That at the time the bond sued on was applied for and at the time the bond was made and delivered, there was a deficit of actual cash in the bank and in the hands of its cashier of more than twenty thousand dollars, which deficit was represented by said irregular loans and advances. That these facts the bank knew at the time the bond sued on was applied for and at the time it was made and delivered, but that defendant did not know them, and had no opportunity of knowing them, and if it had known them or any of them it would not have made the bond sued on.

3. The fourth paragraph of the answer avers that before making the bond the defendant required the bank to answer certain questions in writing relating to the duties and accounts of Porter, cashier. That the bank, through and by its president, C. G. Smallhouse, did make and deliver to the company written answers to such questions. That the bond sued on was made upon the faith of such answers and that the company believed them to be true. That the written paper upon which the questions were propounded, and answers made, and the bond itself provided that the answers to the questions should be conditions precedent and the basis of the bond. That certain stated answers which were material were untrue, and that therefore the bond is void.

4. The sixth paragraph of the answer pleaded that it was agreed by the terms of the bond sued on that the bank should give to the company immediate notice in writing of the discovery of any default or loss under the bond. That before September 3, 1900, the bank discovered and knew the facts upon which the claim asserted in the petition is based. That no notice was given to the company of the discovery of any default or loss under the bond, and that, because of the failure of the bank to give immediate and reasonable notice of the discovery of the alleged default and loss, the bond was avoided.

The reply traverses the general plea that the bond was obtained by fraud and covin. With respect of the special plea of fraud, the reply admits that, at the time the bond sued on was made, that there was a large deficit of cash in the hands of the cashier, amounting to more than twenty thousand dollars, but denies that the bank knew of the deficit at that time. The exact language of this admission in the reply is as follows:

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"The plaintiff admits, however, that it learned, subsequent to said time referred to, that at said time, there was a large deficit of cash, amounting to as much as twenty thousand dollars, but at the time referred to the plaintiff had no knowledge of the existence of said deficit, or of any deficit at all, in its said cash, or that any memoranda, or other alleged evidences of indebtedness were carried or held, as cash, to cover said alleged deficit, or that loans or advances were made to Porter Bros. or other of its customers, not in the regular course of business, or upon notes or bills not appearing upon the plaintiff's books."

The reply by its third paragraph denies that the bank made the answers to questions propounded by the company, but admits that its president did so, and that the answers were false in fact, although, as it avers, the president did not know the answers were false at the time he made them. The only effect of the reply in this respect is to deny the authority of the president to make the answers and to contend that his act did not bind the bank.

The reply, by its fourth paragraph, admits that it knew that Porter was short in his accounts as cashier, and that it did not notify the surety company until some time in January, 1901, and undertakes to avoid the effect of these facts by averring that it did not know whether the whole or any part of the shortage occurred before or after the execution of the bond sued on, or whether the whole or any part of the shortage was the result of the fraudulent acts of Porter.

Upon the trial the surety company offered in evidence the written questions and answers delivered by the bank to the company before the bond was made, signed by the bank, by C. G. Smallhouse, president. To the introduction of this paper the bank objected, and the court sustained the objection and refused to allow the paper to be introduced as evidence, to which the company excepted. The ground of this ruling was that the president had no authority to make the answers to the questions propounded, and that his act did not bind the bank in the absence of a resolution of the board of directors authorizing him to make the answers.

At the conclusion of the evidence for the plaintiff the surety company moved the court to peremptorily instruct the jury to find for the defendant company on the ground of the failure of the bank to immediately notify the company of the discovery of the default and loss, as is provided in the bond sued on. The court sustained this motion and directed the jury to find for the surety company.

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The direct ground upon which the judgment appealed from rests is the failure of the bank to give to the company immediate notice of the discovery of the default and loss. The language of the bond in this respect is: "That the employer shall immediately give the company notice in writing of the discovery of any default or loss hereunder."

AUTHORITIES CITED.

May on Insurance (3d ed.), sec. 462; Inman v. Western Fire Ins. Co., 12 Wend. (N. Y.), 452; Edwards v. Lycoming Ins. Co., 75 Pa. Stat., 378; Trask v. State Fire Ins. Co., 29 Pa. Stat., 198; Railway Passenger Association Co. v. Burwell, 44 Ind., 460; Harbour Comrs. v. Guaranty Co. of North America, 22 Canada Sup. Court, 542; Queen v. The Justices of Berkshire, 4 Q. B. Div., 469; 1 Brandt on Suretyship and Guaranty, sec. 198; Frost on Law of Guaranty Insurance, sec. 79; Rice v. Fidelity & Deposit Co., 103 Fed. Rep., 433; American Surety Co. v. Pauley, 72 Fed. Rep., 470; American Surety Co. v. Pauley (No. 1), 170 U. S., 133; Fidelity & Deposit Co. v. Courtney, 103 Fed. Rep., 599; Fidelity & Deposit Co. v. Courtney, 186 U. S., 342; Guaranty Co. of North America v. Mechanics' Savings Bank and Trust Co., 183 U. S., 402; Farmers' & Drovers' Ins. Co. v. Curry, 13 Bush, 312; Germania Ins. Co. v. Rudwig, 80 Ky., 223.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

This action was brought in the Warren circuit court by the Warren Deposit Bank against Luther R. Porter and the appellee, the Fidelity & Deposit Company of Maryland, upon a bond given to the bank by Luther R. Porter as principal and the surety company as his surety, conditioned that the surety company should, within three months after the receipt of satisfactory proof, reimburse the bank to an amount not exceeding $20,000 for such pecuniary loss of money, securities, or other personal property belonging to the bank, as the bank might sustain by any fraudulent act or acts committed by Porter in the performance of the duties of cashier of the bank during the term beginning May 1, 1900. Upon the trial, on motion of the surety company, the court, at the conclusion of the evidence for the plaintiff, peremptorily instructed the jury to find for

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the defendant. Accordingly the jury so found, and a judgment was entered dismissing the petition as to the surety company, and from that judgment this appeal is prosecuted.

The petition avers the fact that Porter was cashier of the bank, the execution of the bond and its terms, and then avers the breach of the bond as follows: "That while the said bond was in full force and effect, and within the term beginning May 1, 1900, and ending May 1, 1901, the plaintiff suffered pecuniary loss by reason of the fact that the defendant Luther R. Porter fraudulently and unlawfully, while acting as cashier aforesaid, and in violation of his duties as such cashier, embezzled, appropriated, and used twenty thousand ($20,000) dollars of the money of the plaintiff, and fraudulently failed and refused, upon demand, to pay the same, or any part thereof, to plaintiff, or, in whole or in part, to reimburse the plaintiff for said loss, or to any one for its use and benefit." The answer of the surety company, besides traversing the allegations of the embezzlement charge in the petition within the period covered by the bond, pleaded a number of matters in avoidance of its liability. The only one of them that we have found it necessary to determine in this case is contained in the fourth paragraph of the answer, which avers that before making the bond the defendant required the bank to answer certain questions in writing relating to the duties and accounts of Porter, cashier; that the bank, through and by its president, C. G. Smallhouse, did make and deliver to the company written answers to such questions; that the bond sued on was made upon the faith of such answers, and that the company believed them to be true; that the written paper upon which the questions were propounded and answers made, and the bond itself, provided that the

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answers to the questions should be conditions precedent and the basis of the bond; that certain stated answers which were material were untrue, and that, therefore, the bond is void. The reply, by its third paragraph, denies that the bank made the answers to the questions propounded by the company, but admits that its president did so, and that the answers were false in fact, although, as it avers, the president did not know the answers were false at the time he made them. The effect of the reply in this respect is to deny the authority of the president to make the answers, and to contend that his act did not bind the bank. The written questions and answers delivered by Smallhouse, the president of the bank, to the surety company, and alluded to in the pleadings above mentioned, are set out at length by the pleading. Although the special judge who tried this case refused to permit this evidence to go to the jury, and predicated his peremptory instruction upon other facts, we are of opinion that this matter is sufficiently pleaded to have justified its consideration by the court in determining whether the case should have gone to the jury; for it is not material what was the basis of the trial court's action in granting the peremptory instruction if it should have done so for any reason apparent upon the state of the record. At the time the bond sued on was made, C. G. Smallhouse was the president of the bank, and had been for many years. Before the bond was made, the surety company required the bank to answer in writing certain questions relative to the duties and accounts of Porter as cashier, in order that it might determine whether it would or would not make the bond which had been applied for. For this purpose the surety company sent to the bank, or to its president on its behalf, a printed form containing the questions which it wished the bank to answer. This printed form was returned to the surety company with

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the answers to the several questions written thereon, and signed, "Warren Deposit Bank, by C. G. Smallhouse, President, Official Capacity." The printed form was appended to the following communication: "Baltimore, April 13, 1900. To the President of the Warren Deposit Bank, Bowling Green, Ky.: Application has been made to this company to issue a bond of security for Mr. Luther R. Porter, cashier, in your service, to the amount of $20,000. The company desires to have answers to the following questions, and these answers will be taken as the basis of the bond, if issued. Very respectfully yours, Edwin Warfield, President." The printed form closed with this statement and signature: "It is agreed that the above answers are to be taken as conditions precedent and as the basis of the said bond applied for, or any renewal or continuation of the same that may be issued by the Fidelity & Deposit Company of Maryland to the undersigned upon the person above named. Dated at Bowling Green, this 14th day of April, 1900. Warren Deposit Bank, by C. G. Smallhouse, President, Official Capacity." Among the questions which were required to be and which were answered by the president of the bank on its behalf, were the following: "Has the applicant uniformly given satisfaction in his personal conduct and habits? Yes." "Has he kept his accounts correctly, and made proper settlements of all cash and securities entrusted to his care? Yes." "At what date and by whom were applicant's books and accounts (including cash, securities and vouchers, if any) last inspected and examined? Board of Directors. Sept. 6, 1899, by ———." "Were they at that time in every respect correct and proper securities and funds on hand to balance? Yes." It is admitted that these answers were false; that in fact at the time they were made Porter had not kept his accounts

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correctly, or made proper settlements of all cash and securities intrusted to his care, and at the date of the last inspection of the books on September 6, 1899, they were not correct in every particular, nor were proper securities and funds on hand to balance. On the contrary, at that time Porter had abstracted from the bank, and had used without its consent, or the knowledge of its board of directors, about $30,000 of its cash. This fact was apparent at that time from even a casual inspection of the books of the bank and the counting of its cash on hand and inspection of its securities. The evidence did not show, nor was it pleaded, that any one acted for the bank in the matter of contracting for this bond other than its president, Smallhouse. The only person who is shown to have acted for the bank at all in this transaction was its president.

It is pleaded and most earnestly argued on behalf of appellant that the president had not the inherent power, by virtue of his office, to represent the bank in this matter, and that it was not a duty pertaining to his office, either by the powers conferred by the charter or by-laws of the bank, or by its usage or custom, or by vote or resolution of its board of directors. It is claimed that, on the contrary, the board of directors alone had the power and authority, under appellant's charter and under the law, to represent the bank in the transaction of contracting bond for its cashier, and of making statements and representations to the surety on behalf of the bank regarding same. While it may be true that, as a matter of law, answering questions such as those propounded to the president in this case, and making the representations therein contained, were not within either the actual or the apparent scope of the duties of that office, and that the president was not authorized expressly either by the charter or by anything

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appearing upon the minutes of the proceedings of the board of directors to make such representations on behalf of the bank, yet it does not follow from these premises that the president did not act in the bank's behalf in making them. There is no principle of the law of agency truer or more familiar than that, although an agent may act in fact without authority, express or implied from his principal, his act may become binding upon the latter by its ratification. The contracting parties in this matter were three, to-wit, the bank, Porter, its cashier, and appellee, his surety. Each of these contracting parties, by the terms of the bond sued upon, engaged to one or both of the others to do or not to do certain things. To have been binding upon any of them, it must have been executed, or its execution must have been ratified, in a manner binding upon each. Appellant asserts, by seeking to recover upon the bond, that the contract was made on its behalf, and that it was authorized. It is not claimed, nor is it attempted to be shown, that the board of directors acted at all in that matter, so far as any proceeding by their body is concerned. The action of Smallhouse, then, was that which represented the bank in that transaction. If the bank would avail itself of the benefit of his actions, it must take them subject to his representations and statements that induced the execution of the contract by the surety. Furthermore, the bond itself recites: "Whereas, the employer has delivered to the company certain statements and declarations relative to the duties and accounts of the employe, which, together with any statements or declarations hereafter required by or lodged with the company, do and shall constitute an essential part, and form the basis of this contract." If the board examined the bond at all, they are bound to have

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taken notice of these statements, which is enough to have reasonably put them upon inquiry as to the character of the statements therein referred to. But, whether they actually examined the bond or not, they must in all fairness and reason, be held to have assented to its statements, when appellant elects to claim a recovery upon it. It manifestly would not do to impose upon one party to a contract an obligation in favor of another, which was made to depend upon a condition stated in the contract, and yet relieve the latter from the condition because he had not noticed it. Having accepted the result of its president's action in procuring the bond for it, and being required to take notice of all material statements and conditions contained in the bond, appellant is as much bound by these statements and the concurrent representations made by its president and referred to in the bond as if his action and statements had been expressly authorized by the most solemn and specific entry of record upon the minutes of the board of directors' book of proceedings. We can not regard the case of American Surety Co. v. Pauley, 170 U. S., 133, 18 Sup. Ct., 552, 42 L. Ed., 977, as announcing a different rule from the above. In that case it was shown that the president of the bank, who made the representations as to the character, etc., of its cashier, was in collusion with the cashier to loot the bank, and that these statements were but a step made toward consummating that end. It would scarcely need such eminent authority to sustain the conclusion that, when an agent steps aside from the duty enjoined by his position to commit a fraud upon his principal, his representations and acts in that affair are not those of the principal. Guaranty Co. of North America v. Mechanics' Savings Bank & Trust Co., 183 U. S., 402, 22 Sup. Ct., 124, 46 L. Ed., 253. In Rice *et al.* v. Fidelity and Deposit

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Co., 103 Fed., 427, 43 C. C. A., 270, as to the effect of the representations contained in a similar statement to that now being considered, the United States Circuit Court of Appeals, upon a very full consideration and treatment of the subject, thus fairly stated the law: "The parties expressly agreed in writing that the statement of the employers was a part of their contract; that it should be not only the basis of the bond, but a condition precedent, without compliance with which there could be no recovery upon the obligation. The conclusion is irresistible that under this agreement the declaration in this case was of the nature of a warranty, and not of a representation, and our conclusion is: A written statement, made by employers to the obligor in a bond of indemnity against the dishonest acts of their employe, to the effect that they will invariably apply certain checks to his action, which the parties expressly agree, by the statement itself and by the bond, shall be the basis of the latter, and a condition precedent to a recovery upon it is of the nature of a warranty, and not of a representation, and a failure to comply with the promise it contains is fatal to an action upon the bond. Indemnity Co. v. Wood, 19 C. C. A., 264, 73 Fed., 81, 84; American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co., 36 C. C. A., 671, 95 Fed., 111, 113."

Appellant contends that the provisions of section 639, Kentucky Statutes, 1899, as follows: "All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties; nor shall any misrepresentations, unless fraudulent or material, prevent a recovery on the policy"—should apply, and that the representations contained in the statements made by Smallhouse can not, under that section, be treated as warranties. Previous to the enactment of that

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section of the statute, and in those jurisdictions where similar statutory provisions do not exist, such representations were held to be warranties, and, consequently, if untrue to any extent, whether or not material, the policy or contract was invalidated. The case of Rice v. Fidelity, etc., Co., supra, proceeds upon that theory, and its citation is subject to the statutory modification obtaining in this State. The provisions of the section just quoted ought to be applied to this class of contracts. It is found in the chapter of the statutes relating to insurance. The nature of the contract besides is so clearly akin to, if, indeed, it is not a species of, insurance, that its classification with other matters of insurance was likely enough purposely done by the Legislature. It is not material, though, whether the statute does or does not apply to bonds made for sureties, as the statute, properly construed, in no way affects the result and ultimate effect of a materially false representation. Farmers' & Drovers' Ins. Co. v. Curry, 13 Bush, 312, 26 Am. Rep., 194, modified in its extent by Germania Ins. Co. of New York v. Rudwig, 80 Ky., 223, 3 R., 712.

That these misrepresentations were material to the risk in this case there can be no manner of doubt. That they were indisputably false is equally clear. Whether they were fraudulent or not is not, therefore, particularly material. We are of opinion that the effect of these material misrepresentations was to invalidate the bond.

The judgment is therefore affirmed.

Whole court sitting, except Judge Settle.

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CASE 6—ACTION BY F. D. HUSSEY AGAINST GEORGE W. SARGENT AND OTHERS FOR A CONSTRUCTION OF THE WILL OF D. P. HUSSEY, DECEASED.—JUNE 16.

Hussey v. Sargent and Others.

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APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION NO. 1.

FROM THE JUDGMENT THE PLAINTIFF AND THE GUARDIAN AD LITEM OF THE INFANT DEFENDANTS APPEAL. AFFIRMED ON PLAINTIFF'S APPEAL AND APPEAL OF THE GUARDIAN AD LITEM DISMISSED.

WILLS—CONSTRUCTION—VALIDITY—CONFLICT OF LAWS—TESTATOR'S DOMICILE—RULE AGAINST PERPETUITIES—FOREIGN EXECUTOR—ACCOUNTING—JURISDICTION.

Held: 1. A testator, after making special bequests, bequeathed to his wife two-fifths of the income of the remainder during her life, to his son two-fifths thereof, and from the remaining one-fifth he directed that his executors should pay his sister $500 annually for her life, and that the balance of such one-fifth should be "allowed to accumulate for the benefit of" grandchildren, and directed that "such accumulation and such income" should be "equally divided and paid to and distributed among" the grandchildren when a designated grandchild should arrive at the age of thirty-five years, or would have been thirty-five had she lived. The testator made no further disposition of this one-fifth. HELD, to bequeath to the grandchildren, not only the income of this one-fifth, but also the principal thereof.

2. The validity of a will disposing of personal property only is determined by the law of the testator's domicile.

3. Under the laws of New Hampshire, the domicile of a testator disposing of personalty only, the provision in his will directing that a certain portion of his estate shall be allowed to accumulate for the benefit of his grandchildren, and that such accumulation and income shall be equally divided among them when a designated grandchild, two years old at the date of testator's death, arrived at the age of thirty-five years, does not violate the rule against perpetuities, but the direction for accumulation will be enforced for a period of twenty-one years after the testator's death, and then the amount accumulated will be distributed among the grandchildren.

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4. Where an executor appointed in New Hampshire is domiciled in Kentucky and is in possession of the testator's property, none of which is in New Hampshire, the courts of Kentucky may require him to account to the persons entitled to the estate.

BOYLE & YEAMAN, FOR APPELLANT.

The impracticability of requiring an accounting is well illustrated by this case. It is impossible for the court in Kentucky to bring before it the parties in interest, and the city of Nashua, which claims a legacy of $50,000, is not in any way before the court, and can not be brought before it, and the questions which will arise on this claim will necessarily arise and be determined in the courts of New Hampshire. That city will undoubtedly seek to enforce the payment of the legacy. But how can it enforce it if the courts of Kentucky seize and distribute the estate, and what protection can it be to Webster P. Hussey, the foreign executor, who is not before the court, that a court in Kentucky has assumed jurisdiction to settle the estate?

It is submitted that the decree should be reversed.

SYNOPSIS.

1. Order entering the appearance of the infant appellees should be set aside. Barrett v. Godshaw, 12 Bush, 592-599.

2. It is not the function of a guardian *ad litem* to pray an appeal or cross-appeal. Civil Code, secs. 35, 36, 37, 38, 391, 745; Williamson v. Johnson, 4 Mon., 253; Jameson v. Moseley 4 Mon., 414; Hanna v. Spott's Heirs, 5 B. Mon., 362; Walker v. Smyser, 80 Ky., 633; Speak v. Mattingly, 4 Bush, 310; Moss v. Hall, 79 Ky., 40.

3. The cross-appeal ought to be dismissed, because it does not properly bring before the court parties intended in the question sought to be raised by it. Smith's Admr. v. Northern Bank, 1 Met., 575, 580; Gaar v. Lou. Banking Co., 11 Bush, 180, 191; Home Ins Co. v. Gaddis, 3 Rep., 159, 163; Miller v. Miller, 7 Rep., 359; Worthington v. Covington, 10 Rep., 363, 364; Overby v. Rogers, 12 Rep.. 289, 290; McKay v. Mayers, 17 Rep., 827, 828; Marion National Bank v. Phillips, 16 Rep., 159 160; Callahan v. Carr, 1 A. K. Mar., 22; Murphy v. O'Reilly, 78 Ky., 263.

1. The principal of that portion of Daniel Hussey's estate, the income of which was to be accumulated and distributed among his son's children when Emily should become thirty-five years of age, if living, was not disposed of by the will, and passes to Daniel Hussey's heir-at-law. Augustus v. Seabolt, 3 Met., 155; Byers v. Byers, 6 Dana, 311; Traphogen v. Levy, 45 N. J. Eq., 452; Gulick's Extrs. v. Gulick, 27 N. J. Eq., 498.

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2. The provision directing the accumulation of income and its distribution to his son's children when Emily should reach the age of thirty-five, or would have reached that age, if living, is void, because it violates the rule against perpetuities. If such bequest embraced the principal to be distributed likewise, then it is for the same reason also void. Gray on Perpetuities, secs. 672, 369, 374; Jarman on Wills, p. 749, 797; Willett's Admr. v. Rudder's Admr., 84 Ky., 317; Comb's Devisees v. Branch, 4 Dana, 548; Roberts' Extr. v. Brinker, 4 Da., 570; Briscoe's Devisees v. Wickliffe, 6 Da., 158; Hocker v. Gentry, 3 Met., 463; 1 Perry on Trusts, secs. 379, 380, 381, 382, 393; Fosdick v. Fosdick (Mass.), 6 Allen, 41; Lord Southampton v. Hereford, 2 Ves. & B. 54; Stewart v. Cockrell, 7 L. R. (Eq), 363; Smith v. Smith, L. R., 5 Ch. Div., 342; Bentinck v. Duke of Portland, 7 Ch. Div., 693; Seaman v. Wood, 22 Beav., 591; Hagen v. Hale, L. R., 3 Ch. Div., 643; Marston v. Carter, 12 N. H., 162; Downing v. Wehring, 19 N. H., 85; Gen. Stats., chap. 63, art. 1, sec. 27; (Ky. Stats., sec. 2360); Gast v. Wilhite, 2 Da., 170; Moore v. Howe, 4 Mon., 199; Brashear v. Macey, 3 J. J. Mar., 89; Stevens v. Stevens, 21 Ky. Law Rep., 1315; Edgerly v. Barker, 66 N. H. 434; 28 L. R. A. 328; Rolfe Asylum v. Lefebre, 69 N. H. 238; 45 Atl. R. 1087.

3. The chancellor erred in decreeing an accounting in this action by the executors and trustees who qualified in New Hampshire. Vaughn v Northup, 15 Pet. 1; Byers v. Macauley, 149 U. S. 608; Fletcher's Admr. v. Sanders, 7 Da. 345; Fay v. Haven, 3 Mich (Mass.) 109; U. S. v. Hailey, 3 Pac. R. 263; Woodruff v. Young, 43 Mich. 551; 6 N. W. Rep. 85; Burton v. Williamson (Neb. 1902), 88 N. W. Rep. 765; Story's Conflict of Law, Sec. 513.

JAMES QUARLES, GUARDIAN AD LITEM FOR INFANT APPELLEES.

The large interests involved in this case forbid an apology for the extended argument submitted in this brief. Its length however, suggests the propriety of concluding it with a concise resume of the propositions discussed.

If the writer has accomplished his purpose he has established:

A. That this will is governed by, and is to be interpreted according to, the law of New Hampshire, the testator's domicile.

B. That the grandchildren were intended by the testator to take the corpus or capital that yields the income given them as well as the income.

C. That the trust for accumulation for the benefit of the testator's grandchildren is valid for two alternative reasons, viz.:

1. Because the grandchildren have a vested interest in the income and in the capital from which the income is derived, and,

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therefore, the rule against perpetuities has no application whatever to this case.

2. Because if the rule against perpetuities is applicable, the trusts for the grandchildren are nevertheless enforceable under the cy pres doctrine as that doctrine is recognized and adopted by the Supreme Court of New Hampshire in the case of Edgerly v. Barker, 66 N. H. The case just referred to is in line with the cy pres principle as that principle has been incorporated into the jurisprudence of other States and countries, notably England, the New England States, Pennsylvania and New York.

D. That the grandchildren were intended by the testator to be residuary legatees of all that part of his estate not otherwise specifically disposed of—this according to clauses 9 and 10 of the will; that in the residuary estate will be included, principally, (1) the accumulations directed to be made for the benefit of the grandchildren, if those provisions of the will are void, for in case of a void legacy the property goes to the residuary legatee, if there be one, and not to the next-of-kin; (2) the capital or corpus yielding the income directed to be accumulated for the grandchildren, in the event the court should not determine that such capital as well as the income was intended by the testator to be taken by the grandchildren; (3) the $50,000.00 conditional bequest to found a library at Nashua, N. H., should the conditions imposed not be complied with by that city; (4) the $100,000.00 given F. D. Hussey by the 8th clause of the will conditioned upon his surviving his mother, should he die before his mother.

E. That the motion of the appellant to dismiss the cross-appeal granted the infant appellees should be overruled.

1. Because it has always been the practice of this court to recognize appeals taken and prosecuted by guardian ad litem. If a guardian ad litem has authority to take an original appeal (and of necessity he must have such authority else a judgment adverse to an infant could never be gotten to the court of appeals for review), then such guardian has the same authority to pray and prosecute a cross- appeal, between which and an original appeal there is no substantial difference.

2. Because the scope of the guardian ad litem's responsibility and duty under the code requires that he take all affirmative steps, as well as defensive measures, needful for the proper protection of the infant's interests involved in the litigation. The counter-claim interposed on behalf of the infants in this case was proper.

It is asked that the judgment be affirmed on the original appeal; that appellant's motion to dismiss the infant appellees' cross-appeal be overruled, and that there be a reversal on, and to the extent covered by, the cross-appeal.

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AUTHORITIES.

1. The grandchildren's interest in the income is a vested one. Bank v. Bailard, 83 Ky. 481; Turner v. Patterson, 5 Dana, 296; Underhill on Wills, sec. 864; Parker v. Leach, 66 N. H., 416; Crosby v. Crosby, 64 N. H. 77; Thyng v. Lane, 69 N. H. 403; Collins v. Collins, 45 Am. Dec. 420; Converse v. Kellogg, 7 Barb. 792, Tucker v. Bishop, 16 N. Y. 404; 2 Jarman on Wills, 707.

2. The rule against perpetuities does not apply: Gray on Perpetuities, secs. 205 and 672; Lewin on Trusts, Supp., secs. 55 and 81; Josselyn v. Josselyn, 9 Sim. 63; Saunders v. Vautier, 4 Beav. 115; Hilton v. Hilton, L. R., 14 Eq. 468; Gosling v. Gosling, H. R. V. Johns. 272; Hawkin's Wills (Lewin Supp.), sec. 71; Stretch v. Watkins, 1 Madd. 143.

3. The grandchildren are entitled to the principal as well as the income. Stille's Appeal, 4 W. N. C. 42; 1 Id. 249; Thellusson v. Woodford, 4 Ves. 329; Green v. Green, 125 N. Y. 512; Finley v. King's Lessee, 3 Pet. 346; Opinion of the Justices, 66 N. H. 651; Stevens v. Underhill, 67 N. H. 71; Stratton v. Stratton, 68 N. H. 585; Page v. Eldridge Library, 69 N. H. 576; Whitcomb v. Rodman, 47 Am. St. 181; Weatherford v. Stoddard, 58 Vt. 623; Maberly v Strode, 3 Ves. 456; Mathes v. Smart, 51 N. H. 441; Traphagen v. Levy, 45 N. J. Eq. 452; Craft v. Snook's Ex., 2 Beas. 121; Guick's Ex. v. Guick, 10 C. E. Green, 324; Gulick's Ex. v. Gulick, 27 N. J. Eq. 498; Wainewright v. Wainewright, 3 Vis. Jr. 558; Hale v. Beck, 2 Eden, 229; Stretch v. Watkins, 1 Madd., 143.

4. If rule against perpetuities applies, trusts for the grandchildren nevertheless valid under the cy pres doctrine. Will to be construed according to law of New Hampshire. Page on Wills, Sec. 35; 3 Am. & Eng. Ency. Law, 633; Edgerly v. Barker, 66 N. H. 434; 28 L. R. A. 328; Williams on Real Prop., 240; Bouvier Law Dict., 465; Griffiths v. Vere, 9 Ves. 127; Longdon v. Simson, 12 Ves. Jr. 295; Lady Rosslyn's Trust, 16 Sim. 390; Eyre v. Marsden, 2 Keen. 564; Brown v. Williamson's Ex., 36 Pa. St. 338; Hull v. Hull, 24 N. Y. 647.

5. The grandchildren are residuary legatees. 2 Redfield on Wills, 442; Vandewalker v. Rollins, 63 N. H., 463; Jenkins v. Fowler, 63 N. H., 244; Bentley v. Kaufman, 29 Am. & Eng. Ency., 386; N., 3; Ex parte Rogers, 2 Madd., 576.

6. Chancellor should have passed on the question. 10 Ency. Pl. & Prac., 674 N., 3.

7. Motion of appellant to dismiss infant's cross-appeal should be overruled. Reed v. Lou. Bridge Co., 8 Bush, 69; Moss v. Hall, 79 Ky., 40; Brannin v. Sherley, 91 Ky., 450, Robinson v.

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Fidelity, &c., Co., 11 Ky. Law Rep., 313; 10 Ency. Pl. & Pr., 729 N., 7, also 670 and 673; Thomas v. Levering, 73 Md., 461; Kentucky Code sec. 38, subsec. 3, also sec. 96; Pomeroy Eq. Juris., sec. 1063; Bispham's Prin. Eq., secs. 371 and 479; Huhlein v. Huhlein, 87 Ky., 247; Mason v. Mason, 5 Bush, 198; Tinsley v. Tinsley, 15 B. M., 454, 459; Helm v. Bentley, 1 Met., 510.

W. O. HARRIS, AS AMICUS CURIAE FOR INFANT DEFENDANTS.

POINTS AND AUTHORITIES.

1. The law of the testator's domicil governs the construction of his will. Story's Conflict of Law, sec. 465; Wharton's Conflict of Law, secs. 570, 596; Thomas v. Tanner, 6 Mon. 59; Chapline v. Moore, 7 Mon. 175; Fletcher v. Sanders, 7 Dana, 340; Atchison v. Lindsey, 6 Mon. 86; Adams v. Adams, 11 B. M. 77; Townes v. Durbin, 3 Met. 355; 1 Jarman on Wills, p. 6; Danelli v. Danelli, 4 Bush 57; 3 Am. & Eng. Ency. 633; Gray on Perpetuities, Sec. 260.

2. The will is valid under the law of New Hampshire. Edgerly v. Edgerly, 66 N. H. 434.

3. The will disposes of the whole property. Ball v. Hancock, 82 Ky. 107; 29 Am. & Eng. Ency. 1st Ed., p. 404.

4. The court had jurisdiction to compel appellant to account. Atchison v. Lindsey, 6 Mon. 86; Adams v. Adams, 11 B. M. 77.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM.

The appellant, Frederick D. Hussey, brought this suit against the appellees, George W. Sargent, Ezekiel H. Sargent, Webster P. Hussey, Emily P. Hussey, Sr., Fannie R. Hussey, Emily P. Hussey, Jr., Catherine P. Hussey, Mabel W. Hussey, Dorothy Hussey, and Sarah L. Hussey, for the purpose of obtaining a construction of certain clauses in the will of his father, Daniel P. Hussey, who died on the 25th of July, 1883, at his domicile in the county of Hillsborough, in the State of New Hampshire, and whose will, subsequent to his death, was duly admitted to probate in the probate office of that county. He alleges that Daniel P. Hussey's widow, the defendant Emily P. Hussey, Sr., accepted the privision of his will; that he was his only child and heir at law; that at the time of the death of Dan-

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iel P. Hussey he was married to Mary W. Hussey, and at that time had only one child, the defendant Emily Hussey, Jr., who was then two years old; that, after the probation of the will of Daniel P. Hussey, the defendants, Catherine, Mabel and Dorothy, children of plaintiff, were born; that, after the birth of Dorothy, his first wife, Mary W. Hussey, died, and he subsequently intermarried with the defendant, Fannie R. Hussey, but that he had no children by her. He further alleges that shortly after the death of his father, Daniel P. Hussey, he removed from the State of New Hampshire to the city of Louisville, in the State of Kentucky, with his mother and family, where they have since resided; that the debts and specific legacies of Daniel P. Hussey have all been paid, except one to a public library in the city of Nashua, which is not yet due; that the estate of Daniel P. Hussey consisted entirely of personal property, which came into the hands of the plaintiff as trustee and executor, and that he has since collected and received the entire income of the estate, and that no part of it is within the State of New Hampshire; that he was born on the 9th of August, 1857. All of the defendants, except Emily P. Hussey, Sr., and the infant children of the plaintiff, are alleged to be nonresidents, and are proceeded against as such by warning order; and it is alleged that the infant defendants have no statutory guardian, and the petition asks that a guardian ad litem be appointed to defend for them.

The special questions which we are asked to determine upon this appeal are: First, whether the principal of the one-fifth of the estate, the income of which was directed to be accumulated for the benefit of the children of plaintiff in the sixth clause of the will, has been disposed of by the will, or whether, as to this fund, testator died intestate.

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Second, whether the provisions requiring that the balance of the income upon the one-fifth of testator's estate, which is directed to be distributed among the children when Emily P. Hussey, Jr., daughter of Frederick D. Hussey, arrives at the age of thirty-five years, if then living, or at that date when she would have been thirty-five years of age had she lived, being then deceased, is void as in contravention of the law against perpetuities. Third, whether or not the bequest, contained in section 8, of the remainder of two-fifths of said estate, the income of which is now payable to testator's wife during life, is a good and valid bequest in whole or in part, and, if invalid, whether such portion of the estate is or will become vested in the plaintiff or his heirs by inheritance. Fourth, whether or not the provision that the income of any portion of the said remainder be allowed to accumulate is or is not void as against the rule against perpetuities, and, if invalid, whether or not the same is or will become vested in the plaintiff or his heirs by inheritance.

In the joint and separate answer of the infant defendants, Emily P. Hussey, Jr., Catherine P. Hussey, Mabel W. Hussey and Dorothy Hussey, filed by their guardian ad litem, it is claimed that the trusts for accumulation in favor of his wards provided for in the sixth and eighth clauses of his will are valid and enforceable, and that it was the intention of the testator, Daniel P. Hussey, that these defendants or their children, should any of them die, leaving children, before the date of distribution, should under section 8 of his will receive the principal as well as the accumulated income provided for in that section. He also alleges that his infant wards were intended by testator to be the residuary legatees of any portion of the estate not otherwise disposed of in his will, and makes his answer

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a counterclaim against the plaintiff for the purpose of having the rights of the infants ascertained, and requiring the plaintiff as executor and trustee to account for their shares when so ascertained. The court below held that the provisions of sections 6 and 8 of the will, providing for the accumulation and distribution of the income of Frederick D. Hussey's children at the end of thirty-three years, at which time Emily would become thirty-five years old, if living, were valid and enforceable, as was also the bequest of the principal, and adjudged that the plaintiff, Frederick D. Hussey, as trustee and executor, should file a full and complete account showing the annual income from the trust estate from the death of Daniel P. Hussey, and the sums paid by him to Jane M. Littlefield, prior to her death, under the provisions of the sixth clause of the will. To which the plaintiff excepted. The lower court declined to make any adjudication on the question as to whether or not the children of Frederick D. Hussey were entitled to take as residuary legatees that portion of the estate of Daniel P. Hussey not specifically devised by his will. To which the guardian ad litem excepted, and both the plaintiff and the guardian ad litem have appealed.

It is contended in behalf of Frederick D. Hussey: First, that the provisions contained in sections 6 and 8 of the will, for the accumulation of specific portions of the income for the benefit of his children, to be paid to them when his daughter, Emily P. Hussey, Jr., reaches the age of thirty-five, or, if she should not live that long, at such date had she lived, are void, because in contravention of the law against perpetuities, and that, being void, he, as heir at law, inherits the fund; second, that the testator has failed to dispose of the principal from which this income is derived, and that therefore, as heir at law, he is entitled to it

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as intestate property. On behalf of the children it is contended by their guardian ad litem that appellant is wrong on both propositions.

In the first, second, third, fourth and fifth clauses of the will, testator makes certain special bequests about which there is no controversy. We copy the remaining clauses of the will, although only the sixth and eighth are directly involved in this litigation. They are as follows:

"Sixth. After deducting any payment of the legacies before named, I give and bequeath to my beloved wife two-fifths of the income of the remainder during her natural life, and to my said son, Frederick D., I give and bequeath a like sum to-wit: Two fifths of the income of said remainder; and from the remaining one fifth of said income I direct my executors to pay to my sister, Jane M. Littlefield, an annual sum of five hundred dollars, to commence at my decease and payable semi-annually, and to be continued and payable during her natural life; the balance of said one-fifth of said income shall be allowed to accumulate for the benefit of the children of my said son or their heirs, such accumulation and such income to be equally divided and paid to and distributed among said children when Emily P. Hussey, daughter of Frederick D. Hussey, arrives at the age of thirty-five years if then living, or at that date when she would have been thirty-five years of age had she lived, being then deceased.

"Seventh. [He gives, at the death of his wife, $50,000 to the city of Nashua to establish a public library.]

"Eighth. If my said son shall survive my wife, he shall receive at her decease the sum of one hundred thousand dollars from my estate and shall continue to receive two-fifths of the income of the remainder, and any remainder income heretofore received by my said wife, shall, after

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deducting such sums as to my said executors may seem reasonable and fitting for the support of the children of my said son, be allowed to accumulate for the benefit of said children conditioned as payments and distribution as in the sixth clause of the will.

"Ninth. Should my said son die before my said wife, leaving no more than two children, I give and bequeath to my sister, Jane M. Littlefield, my brother's widow, Sarah S. Hussey, and to my said half brothers, Ezekiel H. and George W. Sargent, if living, the further sum of fifteen hundred dollars, to each and all of such one surviving.

"Tenth. In case of the death of my said son before the death of my wife, leaving no children, I give and bequeath to my wife and her heirs one half part of the whole of the remainder of my estate; and the rest and remainder of said estate shall be divided into equal shares between those surviving of the following, to-wit, the widow of my son, my said sister, Jane M. Littlefield, my brother's widow, Sarah S. Hussey, and said half-brothers, Ezekiel H. and George W. Sargent.

"Eleventh. If from any cause my wife should be dissatisfied with the foregoing provisions of this will relative to her share, and should elect to receive such share or distributive part as the statutes provide, waiving the provisions herein set forth, and in lieu of the same, then I order and direct that my said son shall receive one half of the income of the remainder of said estate instead of two-fifths as set forth in section sixth. And I further order and direct that my said son shall receive on his arriving at the age of forty years the principal sum of which he shall have received the income as provided in the preceding sections.

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"Twelfth. I hereby constitute and appoint Webster P. Hussey of said Nashua, and my said son, Frederick D. Hussey, executors of this my last will and testament, hereby revoking any and all former wills by me made, and I hereby authorize and empower my said executors to sell or exchange my estate when same shall be deemed best and advisable and for the interest of said estate by my said executors, but no such change shall be made in said estate except sanctioned by both of said executors; further directing that no bonds are or shall be required of them as such executors. I also direct that all necessary expenses shall be paid to said executors incurred in the execution of the provision of this will, but that said son shall receive no further compensation for his services in the same. But I direct that said Webster P. Hussey shall receive in addition to such necessary expenses a sum not exceeding at any time (besides expenses) the sum of five hundred dollars per annum, and at no time shall said sum so received exceed two per cent. of the income of said property then in care and trust of said executors, and when such percentage on the income as aforesaid would be less than five hundred dollars, then he shall receive and be allowed such sum as would be two per cent. on said income, and such sums so allowed to Webster P. Hussey shall be in full settlement and compensation for his services while acting and serving as such executor.

"In witness whereof I have hereto set my hand and seal this twenty-first day of June, 1883, and interlineations in section seven and eight were made before signing.

"Daniel P. Hussey.

"Signed, sealed, published and declared . . . said Daniel Hussey as and for his . . . and testament in the presence of us, who at his request and in his presence and

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in the presence of each other have subscribed our names as witnesses thereto.

"Chas. W. Hoitt.
"Ira Gustine.
"Mark G. Wilson."

That wills must be sustained, and the intention of the testator given effect by courts whenever it can be done without violating established rules of law or some public policy, is a truism so often repeated that it has become trite. But it expresses a rule which is applicable to the construction of every will when its validity or that of any part of it may be called in question. And when one undertakes to make a will it will be presumed that his purpose is to dispose of his entire estate, and does not intend to die intestate or become intestate after death. And courts are never disposed to put such construction upon a will as would be likely to lead to intestacy, and this inclination is most strong when it is a residue of personalty which is the subject of the bequest. See Maberley v. Strode, 3 Vesey, 456; Whitcomb v. Rodman, 28 L. R. A., 149, note: "And if the reading of the whole will produces a conviction that testator must necessarily have intended an interest to be given, and which is not bequeathed by express and formal words, the court must supply the defect by implication. See Phelps v. Phelps, 143 Mass., 570 [10 N. E., 452]." So far as we are able to discover, there is nothing in any clause of this will which indicates an intention on the part of the testator that any part of his estate should under any circumstances be treated as intestate. After providing for the payment of certain specific bequests, he divides the entire remainder of his estate into five equal parts, and specifically disposes of each of these parts. In the sixth clause of

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his will he gives the income on two-fifths of this remainder to his son, the appellant, without restriction. In the eleventh clause he provides that when he arrives at the age of forty years he shall receive the principal of this two-fifths, and, as appellant has passed the age of forty years, no question can rise as to this two-fifths remainder. He then gives the income on two of the other fifths of his estate to his wife for life, and in the eighth clause of his will provides that if his son should outlive his mother he shall receive therefrom $100,000 in addition to the two-fifths already devised to him; and testator then provides in clause 8 that his executors may deduct such sums as may seem reasonable to them from the income of the remainder of this two-fifths of his estate, on which his wife during her life had drawn the income, for the support of his grandchildren, and that any remainder of income from this two-fifths shall be allowed to accumulate for the benefit of the grandchildren, conditioned as to payment and distribution as in the sixth clause of his will. In the ninth clause he provides for an additional bequest to his brothers and sisters of $1,500 in the event his son shall die before his wife, leaving only two children. In the tenth clause he provides for the distribution of his estate in case his son dies before his wife, leaving no children, and in the eleventh clause he provides for the contingency of his wife renouncing the provision made for her in the will and claiming dower.

We will not consider the disposition made by testator in the sixth clause of the will of the remaining one-fifth of his estate. Out of the income of this one-fifth, testator directs that his executors shall pay his sister, Jane M. Littlefield, annually during her life, $500, and that the balance of the income on this one-fifth shall be allowed to accumulate for the benefit of his grandchildren or their heirs,

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and that such accumulations and income should be paid to them when his granddaughter Emily was thirty-five years of age, or would have been had she lived. It must be conceded that, in order to sustain the bequest of the principal of this one-fifth interest of the estate, we must believe that testator intended and has attempted to make such a bequest. It is clear from the entire will that testator intended that the bulk of the estate, after the death of his widow, should go for the benefit of his son and his grandchildren, and that, distrusting the improvidence of youth, he postponed the time when both his son and his grandchildren could take possession of the principal of his estate devised to them, until they had acquired the discretion which is the usual accompaniment of more mature years. The provisions in the will for the benefit of the wife and son of the testator are clear, definite and explicit. There is not the slightest intimation that testator intended that either of them should take by inheritance as well as by bequest. And we think it is equally clear that he intended that his grandchildren should take the entire accumulations of the one-fifth of his estate devised in the sixth clause of his will, subject, however, to the annuity in favor of his sister, Mrs. Jane M. Littlefield, during her life. It is contended for appellant that the words "accumulations" and "income" are synonymous, and both refer to the premium or interest which may be realized upon the principal of this one-fifth of testator's estate, and neither has any reference to the principal of the one-fifth. It must be conceded that in its ordinary use the word "accumulations" is used in this sense, but in law it has a more definite and technical meaning. Black, in his Law Dictionary, defines its legal meaning as follows: "When an executor or other trustee masses the rents, dividends, or other income which

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he receives, treats it as capital, invests it, makes a new capital of the income derived therefrom, invests that, and so on, he is said to accumulate the fund. And the capital and accrued income thus procured constitute accumulations." We are satisfied that the testator used the word "accumulations" in this sense. He plainly intended that this particular fund should grow; that the surplus income, after payment of the annuity of $500 to his sister, should be added to the principal, and become a part of the capital from year to year; and that in this way a fund should be accumulated from the capital and accrued income for the benefit of his grandchildren. There is another well-settled rule of construction that would give the principal of this one-fifth to the grandchildren. The testator nowhere provides that it shall go to any one else, or fall into the residue of his estate, and where the interest of a fund is bequeathed to a legatee or in trust to him, without any limitation as to the continuance, the principal will be regarded as bequeathed also. See Craft v. Snook's Ex'rs, 13 N. J. Eq., 121, 78 Am. Dec., 94; Gulick's Ex'rs v. Gulick, 25 N. J. Eq., 324; Wainright v. Wainright, 3 Ves. Jr., 558; Hale v. Beck, 2 Eden, 229. We are therefore of the opinion that testator's grandchildren took not only the income, but also the principal, of the one-fifth of the estate.

We will now proceed to the consideration of appellant's second contention, that the provision directing the accumulation of income and its distribution to the grandchildren when Emily should arrive at the age of thirty-five years, or would have reached that age if living, violates the rule against perpetuities. Mr. Perry, in his work on Trusts (5th Ed., vol. 1, section 381), says that: "In determining whether a particular devise is contrary to the rule

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against perpetuities, the inquiry is not whether the contingency upon which the estate is to vest actually occurs within the time limited by the rule, but whether it is possible that the event may not happen within the time. If it is possible that the event upon which the executory devise, or shifting or springing use, is to vest in some person, may not happen within the time, the executory estate is void, although in fact the event actually happens within the time." Underhill on the Law of Wills (vol. 2, sections 883, 886) is to the same effect. And this view was adopted by this court in Stevens v. Stevens, 21 R., 1315, 54 S. W., 835; Coleman v. Coleman, 23 R., 1476, 65 S. W., 832. Undoubtedly this provision of the will under our statute against perpetuities would be held void, but this being the will of a testator who died domiciled in New Hampshire, which disposes alone of personalty, it must be construed according to the law of New Hampshire. On this point, Judge Story, in his work on Conflict of Laws (section 465), says: "It is now a well-settled principle in the English law that a will of personal property, regularly made according to the law of the testator's domicile, is sufficient to pass such property in every other country in which it is situated." Page on Wills, section 35, says: "Where a bequest of personalty creates a trust, its validity is primarily to be determined by the law of the domicile of the testator, not the law of the place where the property is situated." On the same subject, Mr. Wharton, in his Conflict of Laws (section 570), says: "By the English common law, as held both in England and the United States, testamentary capacity as to personalty is governed by the law of the domicile of the testator at the time of his death." And this rule has been followed by this court in numerous decisions. See Chapline v. Moore, 23 Ky., 175; Fletcher's

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Adm's. v. Sanders, 37 Ky., 345, 32 Am. Dec., 96; Townes v. Durbin, 60 Ky., 355, 77 Am. Dec., 176; Dannelli v. Dannelli's Adm'r., 67 Ky., 57. Indeed, we do not understand that this proposition of law is controverted by appellant. It therefore remains to be determined whether the bequest at the time it took effect was in conflict with the law of New Hampshire, the domicile of testator.

It appears from the evidence that there is no statutory provision in New Hampshire against perpetuities, and that the common-law rule prevails there, except in so far as it has been modified by the decisions of the Supreme Court of that State. The common-law rule required that every interest disposed of by will should vest within a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter. See Blackstone's Com., 174; 2 Minor's Institutes, 376, 377. And it is clear that, tested by the restrictions of the common law, the devise in this clause to testator's grandchildren is void because it postpones the enjoyment of the income for a period of thirty-three years, which is longer than the time allowed by the common-law rule. But the Supreme Court of New Hampshire, in 1891, in their decision in Edgerly v. Barker, 66 N. H., 434, 31 Atl., 900, which is also reported in 28 L. R. A., 328, modified that rule of the common law as to perpetuities in a very important particular. In that case the testator devised the remainder of his estate to trustees, who were to pay fixed sums to the testator's two children for life, with remainder of the estate over to testator's grandchildren, born and unborn, and to be paid to them when the youngest should arrive at forty years of age, and upon their giving bond to the children of the testator for the payment of the support provided for them in the will. At common law this restriction in the vesting of the estate would have ren-

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dered the devise void, but the court sustained it by modifying the provision so as to make the gift take effect when the youngest child reached the age of twenty-one years instead of forty, upon the theory that the controlling idea of the testator was that his grandchildren should have the remainder of his estate, and that the postponement of this devise until the youngest child was forty years old was secondary and subordinate, and that the court would not permit the plain intent of the testator that his grandchildren should have the estate to be defeated by the provision that it should not take effect until the youngest was forty years old. The edition of the Lawyers' Reports Annotated, in a note appended to this case, says: "The application of the *cy pres* doctrine to a gift which is not charitable, so as to save it substantially, when the time of distribution fixed by the will is unlawfully remote, is somewhat unusual, but the opinion in the above case presents much authority for the essential principle involved." And, whether the decision in that case be sound or not, it is conceded to be the law of New Hampshire, under which the validity of the devise in this case must be determined.

It is very earnestly insisted for the appellant that the difference between this case and the Edgerly case is so marked as to except it from the rule announced in the Edgerly case. The basis of this contention is that in the Edgerly case the beneficiaries were known, and the limitation was only as to the time when the estate should pass, whilst in this case the persons who are to take can not be known until his grandchild Emily should arrive at the age of thirty-five, or would arrive at that age provided she is alive. And in support of this contention appellants have taken the deposition of a distinguished lawyer and citizen of New Hampshire, who, in answer to a request by appel-

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lant to point out the distinctions between this case and the Edgerly case, said: "In the Barker case, as the bequest would not take effect until all the grandchildren were born and the youngest became twenty-one, the same persons would receive the property as would have taken it at the end of forty years. No change of the beneficiaries could have been made by the court's action, whilst in the Hussey case the vesting of the estate at the end of twenty-one years instead of thirty-three years would cut off any grandchildren born during the twelve-year period, a change of the beneficiaries would have been made by the court's action, and the testator's primary purpose altered." Upon cross-examination, the witness was asked this question: "Mr. Senator, I think it appears from the report of the Barker case that at the date that case was decided by the Supreme Court, or at least at the time when testator died, the testator's son was thirty-five years old and the son's wife was thirty-two years old, and they were approximately at these respective ages at the time the case was decided. Assuming that to be true, suppose that a child was born to that couple after the decision of the Supreme Court of New Hampshire in the Barker case; in your opinion, would that child share with other grandchildren in testator's estate, or would he or she be cut off? Answer, I think they should be cut off, because the estate could not vest until twenty-one years after his birth, and such a limitation after life not in being or gestation when testator died would be void. What the court meant as to unborn children not then in gestation, I can not discover. As a matter of fact, I suppose there were none." Question 17, "Then in the Barker case there was a possibility of a grandchild being born who could not share in the testator's estate; that is a fact, is it not? Answer. Yes, if that

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was the purpose of the court in that case. Possibly the court intended that all of the unborn children should be reckoned and the property vested at the end of twenty-one years from the birth of the youngest child, whenever born. If so, this would tend to impeach the soundness of the decision in Edgerly v. Barker, but would not alter the fact that there was no possibility of change in the beneficiaries by cutting the limitation from forty years to twenty-one years. Question 18. Has the decision in Edgerly v. Barker been overruled or modified? Answer. Not that I am aware of."

It seems quite plain that in Edgerly v. Barker the court put the period of distribution at the time when the youngest child then living became twenty-one years of age, so that there was a possibility in that case that other children might be born after that time who would be excluded. So, after all, it seems to us that it is impossible to distinguish on principle this case from that, and that, following the doctrine laid down in that case, the chancellor properly decided that the provision of the will directing the accumulation of the income was valid and enforceable for a period of twenty-one years after testator's death, and should be carried out by the trustee, and that two-fifths of the income, to be accumulated under the eighth clause of the will after the death of testator's widow, stands upon the same footing as the one-fifth directed to be accumulated under the sixth clause of the will, with the exception that the support for the children is to be deducted from the income derived from this interest, and that both funds go to the grandchildren in twenty-one years after the probation of the will of Daniel P. Hussey.

The third ground relied on for a reversal is that the chancellor erred in requiring an accounting in this action by

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the executor and trustee, as he qualified as such in the State of New Hampshire and received the estate by virtue thereof, and appellant has cited numerous authorities to support his contention that an executor can not be sued out of the jurisdiction of his appointment for a failure to carry out the trust imposed upon him. But the law on this question has long been settled against his contention in this State by numerous adjudications of this court. In the early case of Dorsey's Executor v. Dorsey's Adm'r, 28 Ky., 280, 22 Am. Dec., 33, it was held that a distributee of a decedent might enforce distribution, in the courts of this State, of assets received by the administrator appointed in Maryland, if found in this State. This was followed by Atchison's Heirs v. Lindsey, 45 Ky., 86, 43 Am. Dec., 153, in which the administrator and infant heirs of John Atchison sought to recover of James Lindsey, who administered upon the estate of decedent in South Carolina, certain assets received by him in that State. The contention was made in that case that, as Lindsey was appointed administrator in South Carolina and received the assets sued for there, he could not be held responsible in the tribunals of this State for the surplus remaining in his hands at the suit of a local administrator and infant heirs of decedent. In response to this contention, after referring to Dorsey's Executor v. Dorsey's Adm'r, the court said: "Upon express authority of this case, and upon our own sense of what is required by convenience and justice, and of the comity due sovereignty and laws of South Carolina, we are of the opinion that the mere fact that Lindsey was appointed administrator in that State and received there the assets for which he is now charged, does not of itself exempt him from all liability to be sued in tribunals of this State for a claim growing out of his having thus received assets, to the pro-

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ceeds of which the complainants or some of them are entitled. Whether any decree should finally be rendered against him on this account may depend upon the facts disclosed in his answer, and upon the proof; but we think he was bound to answer." The question was again before this court in Manion's Adm'rs v. Titsworth, 57 Ky., 597, and in a well-considered opinion by Judge Simpson it was decided "that it was settled doctrine in this State that the administrator or executor who is appointed or who qualified in another State and there receives assets in his hands, may be sued in the tribunals of this State by persons entitled to such assets, if he shall have removed to and settled in this State." The question was again before the court in Keiningham v. Keiningham's Ex'r, 24 R., 1330, 71 S. W., 497, and the doctrine was reaffirmed. Appellant avers that his domicile is in this State, that the property disposed of by the sixth and eighth clauses of the will of testator are in his possession and under his control, and that no part of it is within the State of New Hampshire. It is manifest that the New Hampshire courts could not enforce any decree for a settlement of appellant's accounts unless he voluntarily came within their jurisdiction, and that, under the decisions quoted supra, the courts of Kentucky have jurisdiction both of him and the property received by him under the will of testator for the purpose of requiring an accounting at his hands. We therefore conclude that the court did not err in so adjudging. In our opinion the trial court properly declined to pass upon the question raised by the guardian ad litem as to who were intended by testator to be the residuary legatees of any portion of his state not otherwise disposed of by his will.

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For reasons indicated, the judgment upon the original appeal is affirmed, and the cross-appeal prayed by the guardian ad litem dismissed, and the cause remanded for proceedings not inconsistent with this opinion.

Whole court sitting.

Petition for rehearing by appellant overruled.

CASE 7—ACTION BY PEOPLE'S ELECTRIC LIGHT & POWER CO. AGAINST THE CAPITAL GAS & ELECTRIC LIGHT CO. TO ENJOIN THE DEFENDANT CO. FROM INTERFERING WITH PLAINTIFF'S ALLEGED EXCLUSIVE RIGHTS, &C.—JUNE 16.

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People's Electric Light & Power Co. v. Capital Gas & Electric Light Co.

APPEAL FROM FRANKLIN CIRCUIT COURT.

FROM THE JUDGMENT BOTH PARTIES APPEAL. AFFIRMED.

MUNICIPAL CORPORATIONS—EXCLUSIVE FRANCHISES—GAS COMPANIES—RIGHT TO FURNISH ELECTRIC LIGHT—RIVAL CLAIM—PLEADING—DEFENSES—ENLARGEMENT OF FRANCHISE.

1. Where the exclusive franchise to furnish light to a city has been granted to a gas and electric light company, and another company also claims such right, thereby casting a cloud on the title of the first company to the right claimed by it, injunction to restrain the second company from setting up such exclusive right is the proper remedy, though the first company is not in possession of the streets.
2. In an action by a gas and electric light company, claiming that the exclusive franchise to light the streets had been granted to it, to restrain another company from setting up a claim to a similar exclusive right, a plea of champerty by defendant, on the ground that it had the exclusive right to furnish light at the time the plaintiff's franchise was granted, was demurrable.
3. A plea denying that the sale of the franchise to appellant was advertised, or that bids were publicly received therefor, or that the franchise was sold to appellant as the highest and best bidder, stated a good defense.

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4. Where the charter of a gas company did not authorize it to furnish any other light than gas, and it had no facilities for so doing a franchise granted by a city to such company, giving it the exclusive right to use the streets to furnish gas and "other illuminating light," was void as to "other illuminating light."
5. A city contracted to deed its gas plant and grant an exclusive franchise to furnish gas and other light to a company whose charter gave it no right to furnish any light but gas. The deed was made to an assignee of this company, and the assignee's charter provided that it should furnish gas and electric light. The deed imposed no obligation on the grantee to furnish any other light than gas. Held, that the deed did not give the grantee an exclusive right to furnish electric light.
6. Contracts made by the grantee with the city with reference to furnishing electric lights, which did not impose on the company any duty to furnish such light, did not give the company an exclusive right to furnish electric light.
7. Under Constitution section 164, providing that before granting any franchise for a term of years, a city shall receive bids therefor and award the same to the highest and best bidder, a city can not enlarge a franchise already granted, except by award to the highest and best bidder.

HAZELRIGG & CHENAULT AND JOHN W. RAY, FOR APPELLANT.

Under the provisions of section 164 of the Constitution, the city council of Frankfort proceeded to advertise, and sold a franchise to the appellant company, and it is conceded, in strict conformity to said section, and the question presented is whether this is an exclusive franchise or a mere privilege to run for twenty years. Our contention is that the word franchise includes more than a privilege, and by this sale the appellant acquired the exclusive privilege to supply the city of Frankfort, its inhabitants, and consumers, with electricity for lighting and other purposes.

The question then, is whether the city had the power to grant an exclusive franchise to the appellant, because of the rights of the appellee. If the appellee has an exclusive right it exists in perpetuity, which is not favored in the law, unless there is a clear unmistakable intention of the Legislature to grant such power to the city council to make such contract, which does not appear in any charter of said city.

(1) We contend that the charter of the defendant gives it no franchise, no exclusive right. It is only an act of incorporation that authorizes it to manufacture and sell electricity and gas. But the right to manufacture electric light not having been ex-

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ercised from the time of its charter in 1882 until 1890, we contend that under chapter 56, section 12, General Statutes, this non-user of the right to manufacture and sell electric lights, was abandoned and forfeited.

(2) We contend further that under the schedule of the Constitution, such franchise if it ever had been exclusive, and was in perpetuity, is repugnant to the Constitution ,and was repealed in September, 1897, six years after the adoption of the Constitution.

(3) In 1832 when the original charter of appellee was passed, electricity was not in use as a lighting property, and was not in the mind of the Legislature when said charter was granted, and therefore was not included or covered by the charter.

(4) If the city of Frankfort in 1882 had the right to sell the electric light franchise, and did sell it and the appellee company had the right to buy it, and did buy it, still, when the company come to make the contract for lighting they must make it in conformity to the law governing the making of contracts at the time the contract was made, and this the appellee failed to do and its contract is absolutely void.

AUTHORITIES CITED.

Beard v. The City of Hopkinsville, 95 Ky., 239; Nicholasville Water Co. v. City Nicholasville, 18 R., 592; Dillon on Mun. Corp., secs. 692 to 696; 84 Ky., 175; 25 Com., 19; 132 Ind., 575; 18 Ohio, 262; 47 W. Vir., 739; 172 U. S., 1; 32 Am. St. Rep., 457; 161 Pa. St. Rep., 510; 146 U. S., 258; Charles River Bridge Case.

J. B. LINDSEY AND JOHN W. RODMAN, FOR APPELLEE.

SALIENT POINTS.

1. From anterior to 1869 and up to 1882 the board of councilmen of the city of Frankfort had in itself the exclusive franchise for using the streets, &c., and to furnish to the city and its inhabitants from a light plant, lights of all kinds, including the two principal kinds—gas and electricity.

2. The act of March 28, 1872, authorized the board of councilmen of the city of Frankfort to sell or grant or lease any property the city had, including franchises, on such terms and for such sums as the board of councilmen should deem for the best interests of the city.

3. The said board had not up to 1882 erected any electric plant, but had had in operation a gas plant from long anterior

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to 1869, and the same was out of repair and insufficient for the want of the city and its inhabitants.

4. There being no investment in any electric plant, it was in the power of the Legislature to modify the city's electric franchise right, and it did so by act of April 24, 1882, which incorporated the appellee company and gave it the powers granted there in perpetuity, among others, the right to acquire property of every kind necessary for the purpose and the franchise to erect in the city of Frankfort, and on and over the streets, &c., thereof an electric light plant (this without obtaining the consent of the municipal authorities) and with the consent of the city council to also erect in the city and on and under the streets, &c., thereof a gas plant, and the right and franchise in perpetuity to furnish both gas and electricity to the city and its inhabitants desiring the same, and the charter obligated appellee to furnish both kinds of lights to the city and its inhabitants on such reasonable terms as might be agreed on by the parties from time to time, the gas never to cost more than $3 per 1,000 feet (cubic).

5. That after the granting of appellee's charter it was in the power of the city to hold on to its exclusive gas franchise and also to go on and erect an electric light plant, though the appellee could also erect and operate another electric plant in the city and operate it; but it was also in the power of the board of councilmen of the city of Frankfort (under authority of the act of March 28, 1872) to make the franchise for gas and electric lights of the Capital Gas & Electric Light Company, exclusive for the period of forty years (*or even in perpetuity*). (See Newport Light Cases in 84 Ky. and 89 Ky., and cases in 115 U. S. Rep., and other authorities referred to in printed brief.

6. That by the deed and contract between the board of councilmen of the city of Frankfort and the Capital Gas & Electric Light Company, of date June 27, 1882, for the consideration of $40,000, to be paid at the end of forty years from July 1, 1882, and the interest thereon to be paid semi-annually, and the other considerations set out in the deed including a lien on the land, plant and franchises to secure the payment of the $40,000, &c., the entire lighting plant of the city including the exclusive franchises for the use of the streets, &c., of the city for the purposes and the exclusive right to furnish gas and electric lights to the city and its inhabitants, were granted and conveyed to the appellee company, thus making the electric light franchise of appellee exclusive which had not been by its charter made exclusive.

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7. That the charter of appellee was as a matter of law to be read into and formed a part of the contract between the city and appellee of date June 27, 1882, and appellee was bound by its charter and said contract as and when the city or citizens required it, to erect from time to time all such necessary machinery, posts, wires, pipes and other things requisite to furnish the city and its inhabitants with both gas and electric light and that appellee did do this; that it complied with the terms of its charter and said contract at all times, and is yet doing so, and on May 4, 1889, appellee had in full operation both gas and electric plants, and had agreed with the city and citizens on the prices to be charged for both gas and electric lights, and ever since May 4, 1889, the appellee has continued and is yet continuing to agree on prices, and furnishing the city and all other consumers with both gas and electric lights; and hence neither of its franchises were made void by section 191 of the Constitution and there is no authority any where for now invalidating said franchises.

8. As to the contracts of substitution of September 18, 1893, there was of course no new grant of power, or new grant of exclusive franchise, but a clear recognition by the city and appellee that appellee had the exclusive right to the electric franchise and was under duty bound by its franchises, charter and contract to furnish the city and other consumers with electric lights of all kinds, including arc electric lights of nominal 2,000 candle power to light the streets of the city in substitution for gas street lamps, of the kind and in the manner as has been done since May 4, 1889, at a few of the intersections of the principal streets of the city.

9. That the validity of the said deed and contract, and appellee's charter and the appellee's powers thereunder have been construed and held valid in the suit of W. S. Dehoney and Others v. The Board of Councilmen of the City of Frankfort, and this appellee; and in case of the Board of Councilmen of the City of Frankfort v. Capital Gas & Electric Light Co. (See case of Louisville v. Louisville Water Co., 20 Ky. Law Rep., 1529.)

10. The franchises granted to appellee by its charter and under its contract of date June 27, 1882, with the city, were not repealed by section 573 (chap. 32) of Kentucky Statutes nor any other section thereof, nor by any provision of the Constitution, but are expressly saved by the Constitution itself.

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11. That the ordinance of 1901 does not show the city intended to grant appellant an exclusive franchise is clear from the reading thereof, and it is also manifest the appellee did not by its notice give color to any such assumption, nothing in the notice can be found on which to make such claim.

12. It was admitted in the oral argument that the alleged grant of franchise to appellant if operative at all, took effect on November 26, 1901, and that appellant had not exercised any of the privileges or performed any of the duties required by said ordinance up to the present time. (See also the averments of appellant's petition.) Now we say that the alleged grant of franchise or any claim thereto has become void; for the ordinance provided (sec. 5) such person or corporation acquiring such franchise or privilege, shall construct such electric light system within six months from the time such grant or such franchise or privilege shall become effective.

The appellant has not complied with this requirement, but has violated the same and also violated the provision of section 3290, subsection 35, of Kentucky Statutes, which latter provides that "all such grants shall expire and become void notwithstanding a consideration shall have been paid therefor unless a bona fide organization shall have taken place, and *business been* commenced and prosecuted thereunder in good faith within one year from the date thereof. The council may impose other conditions and terms in addition to and not inconsistent with those enumerated herein."

13. The appellant, (the plaintiff below) seeks to enjoin appellee from asserting or exercising any right or privilege as it is continuing to do, to furnish electric lights to the city or citizens of Frankfort; and to have the court to adjudge that the appellant has such right to the exclusion of appellee. We say that appellant must stand or fall on the strength of its own title and not upon any defect in that of appellee, or on any assumed acts ultra vires on appellee's part. (Norwich Gas Co. v. Norwich City Gas Co., 25 Conn., 19-31), and we insist appellant has no standing in court and no right to question appellee's claim.

AUTHORITIES CITED.

1. On appellee's special demurrer and the first two paragraphs of its answer. Ky. Stats, sec. 453, and p. 177, sec. 11; Ky. Stats., sec. 210 to 216; 6 Am. & Eng. Ency. Law, p. 143; sec. 4,

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p. 143 (n. 1), p. 148, p. 150, sec. 5; Miller v. F. & F. S. T. P. Co., 22 Ky. Law Rep., 1039.

2. Ultra vires. 2 Chitty on Con., sec. 977; Bibb, &c., v. Miller, &c., 11 Bush, 306; Boone on Corp., secs. 101, 203, and cases cited; Miller v. F. & F. S. T. P. Co. 22 Ky. Law Rep., 1039; Bank v. Matthews, 92 U. S., 628; Morris v. Schollville, &c., T. P. Co., 6 Bush, 672; 27 Am. & Eng. Ency. Law, pp. 360, 362, 363; Angel & Ames on Corp. sec. 777.

3. As to res judicata. W. S. Dehoney, &c., v. Board of Councilmen; Gould v. Evans, &c., R. R. Co., 91 U. S., 533; 7 Am. & Eng. Ency. of Law, pp. 2, 9 (n. 2); Singer v. Hutchinson, 75 Am. St. R., 133; Hart v. Molton, 76 Am. St. R., 881; Ahlers v. Thomas, 77 Am. St. R., 820; Board of Councilmen v. C. G. & E. L. Co., 16 Ky. Law Rep., 780.

4. On alleged forfeiture by nonuser. Kenton Co. Ct. v. Bank Lick T. P. Co., 10 Bush, 529; Ch. 56, Gen. Stats., secs. 12, 17, 18; Gen. Stats., p. 157, subsec. 2 of sec. 2; 56 Pa. St., 325; 31 Ark., 476; 5 Ind., 77; Cooley on Con. Lim., 106; Angel & Ames on Corp., 774, 777; Boone on Corp., 203, 303; 2 Morowitz on Corp., 1014, 1040; University v. Williams, 2 Gill, N. J., 265; 2 Gill, N. J., 353; 1 Abb. U. S., 9; 47 Me., 189; 34 Vt., 256; 25 Mich., 99; 49 Mich., 143; 22 Ky. Law Rep., 1073; 2 Kent's Com., 313; Ky. Stats., 515; 12 Conn., 7; Limitation of five years against forfeitures, Ky. Stats., 2518.

5. As to constitutional questions. Ky. Constitution, secs. 3, 13, 19, 26, 52; Ky. Constitution, secs. 163, 164, 191, 203, 242, and Schedule of same; N. O. Gas Co. v. Louisiana Lt. Co., 115 U. S., 650; N. O. Waterworks Co. v. Rivers, 115 U. S., 674; Lou. Gas. Co. v. Citizens Gas. Co., 115 U. S., 683; Louisville v Louisville Water Co., 20 Ky. Law Rep., 1529.

6. On contracts substituting electricity for gas. Ky. Constitution, secs. 163, 164; Appellee's Charter, act approved April 24, 1882; Deed and Contract from City; Louisville v. Louisville Water Co., 20 Ky. Law Rep., 1529; Ky. Stats., secs. 3237, 3258.

7. General view of the case, authority and perpetuity. W. S. Dehoney, &c., v. Bd. of Councilmen of City of Frankfort (including appellee), MS copy in record; Board of Councilmen v. C. G. & E L. Co., 16 Ky. Law Rep., 780; Atlantic City Waterworks Co. v. Atlantic City, 19 Vroom, 380; City of Newport v. Newport Lt. Co., 84 Ky., 166 to 189; N. O. Gas Co. v. Louisiana Lt. Co., 115 U. S., 665; N. O. Waterworks Co. v. Rivers, 115 U. S., 674; Newport v. Newport Lt. Co., 89 Ky., 455; Bond v. Meagher, 19 N. J., 376; Boone on Corp., 287, 289; Thompson on Corp., sec. 5660; Charter of City of Frankfort, 1869, p. 478; Amendment to same act of March 25, 1872; Legislative Charter

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of Appellee, Act April 24, 1882; Charter Cities 3d Class, Ky. Stats., secs. 3256, 3236, 3238, 3290, subsec. 5; Deed and Contract grant from the city June 27, 1882; 29 Ga., 50; 43 Ga., 67; 8 Mich., 467; 8 Ind., 21; 40 N. Y., 273; Binghampton case, 3 Wallace; State v. Milwaukee Gas Lt. Co., 29 Wis., 454.

OPINION OF THE COURT BY JUDGE SETTLE—AFFIRMING.

This equitable action was instituted by the appellant, People's Electric Light & Power Company, to enjoin the appellee, Capital Gas & Electric Light Company, from interfering with its alleged exclusive right to supply the city of Frankfort, its inhabitants, and consumers, with electricity for lighting and other purposes, as provided by its articles of incorporation and authorized by an ordinance of the city. The answer and counterclaim filed by appellee contains six paragraphs, and denies that appellant has or owns the exclusive right, or any right, to supply the city of Frankfort, or its inhabitants, with electricity for lighting, or any other purpose, or that the city council had the power, by ordinance or otherwise, to confer upon appellant any such right, and for further defense avers in substance that it and its assignor and predecessor, the Southern Gasworks Company, by purchase and deed from the city of Frankfort, acquired title to its gasworks, mains, and pipes, and to the exclusive use of its streets and alleys, for the purpose of furnishing gas and electricity for the lighting of its streets and the use of its inhabitants, which right has been confirmed by repeated subsequent contracts made between it and the city, and that this right is about to be interfered with by appellant, for which reason the answer asks an injunction against it.

Appellant filed general demurrer to the answer and counterclaim, and each paragraph thereof, which was sustained to the first, second, fourth and fifth, and overruled as to the third and sixth paragraphs. Thereupon an amend-

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ed answer and counterclaim was filed by appellee, to which and to the several paragraphs of the original answer, as amended, appellant again filed a general demurrer, and, the case being submitted on that demurrer, it was sustained as to the first, second, fourth, and fifth paragraphs of the answer as amended, and also as to the new paragraph added by the amended answer, to all of which appellee excepted. The cause was then submitted for trial and judgment upon the pleadings and an agreed writing containing all the evidence, documentary and otherwise, upon which the parties relied in support of their respective contentions. Whereupon the special judge, expressing his views in a well considered and ably written opinion, rendered judgment to the effect that neither appellant nor appellee has the exclusive right to use the streets of the city of Frankfort for the purpose of furnishing electricity to the city or its inhabitants for lighting purposes, and enjoining each of them from asserting any such exclusive right. Appellant and appellee each excepted to the judgment and prayed an appeal to this court, and the case is now before us upon both appeals for final adjudication.

The facts presented by the pleadings and evidence are as follows: The city of Frankfort, by a written contract of May 30, 1882, made with the Southern Gasworks Company, the assignor of appellee, sold to it its gasworks, which had theretofore been constructed and was then being operated under a charter from the Legislature granted the city. By the terms of this contract it granted, or attempted to grant, to the Southern Gasworks Company, the exclusive right to the use of its streets "for the purpose of laying, repairing, and properly operating all mains, pipes and other necessary machinery for the furnishing of all gas or other illuminating light in said city." The consideration of this sale, as

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recited in the contract, was the undertaking of the Southern Gasworks Company to execute to the city forty interest-bearing bonds of $1,000 each, payable forty years from July 1, 1882, with the privilege reserved of paying the bonds, or any one or more of them, before maturity. The company further undertook to improve the gasworks, extend the mains, to light a certain number of street lamps at the price named in the contract, and to furnish private consumers gas at not exceeding $2 per 1,000 cubic feet; but this maximum price was to be adjusted every five years, so as not to exceed the average price charged for gas in cities or towns of the same or a less population than Frankfort. The contract mentioned, and all rights incident and appertaining thereto, were assigned by the Southern Gasworks Company to the appellee, Capital Gas & Electric Light Company which became incorporated by a legislative act approved April 24, 1882, and by deed of June 27, 1882, the city of Frankfort conveyed appellee, as assignee of the Southern Gasworks Company, all the property and rights which it had agreed theretofore to sell to the Southern Gasworks Company; it being recited in the deed that the appellee had already executed and delivered the forty bonds required of the Southern Gasworks Company by its contract with the city. The appellee by the terms of the deed was to assume and carry out all the undertakings of its assignor with the city. By virtue of the rights thus acquired under the contract and deed mentioned, appellee only manufactured and furnished gas for several years for the use of the city and its inhabitants; but about January 1, 1890, it constructed an electric light plant, and began for the first time to furnish electric light to the city and its inhabitants, though no contract was made by appellee with the city in reference to electric lighting until Sep-

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tember 18, 1893, at which time a new or supplemental contract was made between appellee and the city, under which the electric lights were to be furnished. This contract contained the statement that it was entered into at the request of the city, and because it desired a modification of the former contract. It appears that since that time various supplemental agreements have been made between the parties from time to time for the continued lighting of the streets; but neither the contract of September 18, 1893, nor any of those of subsequent date, contain any provision or agreement requiring appellee to furnish electricity to private consumers or regulating the price thereof.

Appellee's claim of the exclusive right to the use of the streets of the city for furnishing electricity to the city and its inhabitants for lighting purposes is based upon its various contracts with the city. Upon the other hand, the appellant, People's Electric Light & Power Company, contends that it has the exclusive right to the use of the streets for the furnishing of electric lights to the city and its inhabitants by virtue of the ordinances of the general council passed July 23 and August 13, 1901, and that the franchise granted it by these ordinances was duly advertised for sale, and bids therefor were received publicly, and that the franchise was thereby awarded to it as the highest bidder. It is averred by appellants that appellee is wrongfully asserting an exclusive right or franchise to supply electricity to the city and its inhabitants for lighting purposes, and is thereby casting such a cloud upon its title that it is being prevented from selling, pledging, or mortgaging its stock, or selling its bonds, whereby to raise the money with which to erect its plant, and it therefore

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asks that appellee be enjoined from asserting the claim of exclusive right set up by it.

We think the special judge properly sustained the appellee's general demurrer to the extent indicated in the judgment. The first paragraph of the answer interposes the defense that appellant can not maintain the action to quiet its title to a franchise to light the city of Frankfort with electricity, as it is not in possession of the streets and alleys of the city, the use of which is necessary to the enjoyment of its franchise. The contention of appellant is that the cloud cast upon its title to the franchise is preventing it from selling, pledging or mortgaging its stock, or selling its bonds, in consequence of which it has been unable to erect its electric plant, or to enjoy the franchise granted it by the city of Frankfort. In such a state of case, injunction is the only remedy, if, as a matter of fact, appellant owns the exclusive franchise to which it lays claim. This point seems to have been well settled in Citizens' Gaslight Company v. Louisville Gas Company, 81 Ky., 263, 5 R., 72.

The second paragraph contains a plea of the statute of champerty, which has no place in a case like this. Although it may have been true that, at the time of the grant of the franchise from the city of Frankfort to appellant, appellee was exercising a like franchise under claim that it was exclusive, such a claim, unless true in fact, could not prevent the city from granting a similar franchise to appellant. Upon the other hand, if appellee's franchise was exclusive, the grant of the franchise by the city to appellant was simply void.

The third paragraph of the answer, by denying that the sale of the franchise to appellant was advertised, or that bids were publicly received therefor, or that the franchise

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was sold to appellant as the highest and best bidder, raised an issue of fact upon which proof was necessary. Therefore this paragraph was properly held to be good upon demurrer. The fourth and fifth paragraphs set forth the various contracts between appellee and the city, upon which its claim to the exclusive franchise is based, and they present the contention that the grant of the franchise to appellant is void, because its effect is to impair the obligation of appellee's contract with the city. By legislative sanction the city of Frankfort was invested with the title to its streets and alleys, and all other property of the city, including its gasworks and waterworks; all being under the exclusive control of the city council. By an act of March 28, 1872 (Laws 1871-72, p. 393, c. 899), it was provided "that the board of councilmen of the city of Frankfort be, and they are hereby, authorized to grant, bargain, sell, and convey, to rent or lease, any and all property, or any part thereof, belonging to said city of Frankfort, be the same lands, tenements, goods, chattels, or franchises, or immunities, on such terms, and for such sums, and at such times, as said board of councilmen shall deem for the best interest of said city of Frankfort."

We find in appellee's charter the following provisions: "Said company shall furnish gas light or electric light to any person on such terms as the company and such person may agree upon, and any such contract shall be obligatory and enforceable in any proper court in this Commonwealth" —and, further, that the appellee company shall have authority "to put up lamp posts and electric lights, and that said gas and electric lights shall be furnished to the city at a reasonable price per light per annum, as may be agreed on." It is contended for the appellee that these provisions of its charter, considered with those of the charter of the

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city, conferred upon the city ample power to grant appellee the exclusive franchise asserted by it; and it is conceded by the special judge that some of the authorities cited by counsel for appellee tend strongly to support that contention, though he properly, as we think, declined to accept that view. We agree with him that the question of whether the city has the power to grant an exclusive franchise, such as is claimed by appellee is this case, is not before us for decision. In our opinion, it did not, by its several contracts with the city, obtain the exclusive franchise claimed for it, even though it be conceded that the city was authorized to grant it.

The Southern Gasworks Company, appellee's assignor, made the original contract with the city, under which appellee claims title to the franchise asserted by it. It is clear that the charter of the Southern Gasworks Company provided only for the furnishing of gaslight. It conferred no authority to use any light other than gaslight, and its contract with the city was to furnish only gaslight; indeed, it was unprepared to furnish any other. We therefore further agree with the special judge that the contract which granted, or attempted to grant, to that company the exclusive right to the use of the streets of the city for the purpose of supplying "gas or other illuminating light" was void as to "other illuminating light."

An examination of the charter of appellee will show that it did confer power to make and supply electricity, and to accept from the city a grant of the use of its streets for that purpose; and the city having carried out its contract with the Southern Gasworks Company, by executing a deed to appellee, as its assignee, conveying to it the gasworks, and the exclusive use of the streets of the city for supplying "gas or other illuminating light," it becomes im-

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portant to determine the effect of that deed. It will be borne in mind that the Southern Gasworks Company did not, in its contract with the city, undertake to erect an electric plant, or to supply electric light to the city or its inhabitants. It did, however, undertake to issue $40,000 worth of bonds, and to improve the gasworks, extend the mains, and supply gas to the city and other consumers at agreed prices specified in the contract. The appellee, as assignee of the Southern Gasworks Company, assumed by the deed only such obligations as rested upon the latter; nothing more. Therefore it was under no duty to erect an electric plant, or to furnish electricity to the city or its inhabitants for lighting. We do not think it was the purpose of the city to confer an exclusive right upon appellee's assignor, or upon it, to furnish electricity for the city's use and that of its inhabitants, without imposing an obligation to compel it to exercise that right.

It is contended, however, by counsel for appellee, that the incorporation of such an obligation in the contract was unnecessary, as it was required by its charter to furnish electricity for lighting purposes. We are of opinion that the provision of appellee's charter that "said company shall furnish gas or electric light to any person on such terms as the company and such person may agree upon" only expressed the duty which rests upon every corporation enjoying a public franchise to serve all alike, and does not compel the exercise of the franchise. We find that, for seven years after its right to use the streets of the city for lighting purposes was secured, appellee failed to use electricity for that purpose; and this failure to exercise its electric light franchise demonstrates that it was under no obligation to do so. Furthermore, there was no time during that seven years that it could have been compelled by the

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city to furnish electric lights to it or its inhabitants; and yet appellee insists that it had the right to prevent any other person from doing so. We are unable to find anything in any of the contracts between the city and appellee that requires the latter to furnish electric lights for the use of the city or its inhabitants. Upon the contrary, we find in all of them that appellee has been careful not to recognize any obligation on its part to supply electricity. There is no ground for appellee's contention that its alleged exclusive franchise was confirmed by its contract of 1893 made with the city of Frankfort. The language of that contract shows no purpose or attempt to confer upon appellee any new right; and, in view of section 164 of the present Constitution, it was without authority to enlarge appellee's rights under the first contract, except by its becoming the highest and best bidder for the additional privilege; and, besides, it is by no means certain that the city had the power to grant an exclusive franchise. In the case of City of Newport v. Newport Light Co., 14 R., 845, 21 S. W., 645, this court held that an exclusive gas franchise, which had been conferred by the city upon the light company, did not confer the exclusive right to supply electricity for lighting purposes, though the contract authorized the light company to substitute electricity for gas.

We do not feel called upon to consider the contention of appellant that the grant from the city to appellee is in perpetuity, and therefore void. It was the opinion of the special judge that the grant is limited to forty years, because the bonds issued by appellee to the city, which are secured by lien on its property and franchises, were made payable in forty years. We are not disposed to question the correctness of this conclusion; but, as the pleadings make

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no issue on this question, its consideration is unnecessary. Nor is it necessary to decide that the failure of appellee to exercise its alleged exclusive franchise for several years prior to January 1, 1890, worked a forfeiture thereof, as such nonuser and consequent forfeiture are not pleaded by appellant. It is manifest that the appellant's franchise is not exclusive, as the language of the ordinance granting it will show. Upon the whole case, we have found no difficulty in reaching the conclusion that neither appellant nor appellee is entitled to the exclusive franchise claimed.

For the reasons herein indicated, the judgment of the lower court is affirmed upon both the original and cross appeal.

CASE 8—ACTION BY R. N. CORNETT AGAINST WILLIAM ISON AND OTHERS TO QUIET TITLE TO HIS LAND.—JUNE 17.

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121 78

Ison and Others v. Cornett.

APPEAL FROM HARLAN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANTS APPEAL. AFFIRMED.

INFANTS—CONVEYANCES—DISAFFIRMANCE — CONDITIONS — RECONVEYANCE OF PROPERTY RECEIVED.

Held: 1. A purchaser of land from a grantor who had, during infancy, made a prior conveyance thereof to another, was not precluded from acquiring a good title by reason of his knowledge of such prior conveyance.

2. One who has purchased land from an infant, and given in part consideration therefor other land, which the infant has also

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sold, can not demand of such infant a disaffirmance of the latter sale as a condition of disaffirming the sale to him.

3. A stepfather, standing to his stepdaughter in loco parentis, traded to her, when she was seventeen years of age, for property belonging to her, property and money amounting in all to $550. When the daughter became of age, she elected to disaffirm her conveyance, and sold the property to another for $1,100, her father having in the meantime cut $200 worth of timber therefrom. HELD, that the father could recover the land which he had conveyed, so far as it or its representative was still retained by the daughter, and would be charged with the value of the timber which he had cut, and the reasonable rental value of the land while in his possession.

N. B. HAYS, J. G. & J. S. FORESTER AND J. H. HAZELRIGG, ATTORNEYS FOR APPELLANTS.

About twenty years ago John M. Creech died, leaving a widow, who has since married William Ison and daughter, Pasha, who has since married George Ison, and also a son, Joseph Creech. He owned four tracts of land which were divided between his two children, Pasha Ison and Joseph Creech, subject to the widow's dower.

In November, 1896, while Pasha was still an infant, she and her husband swapped her interest in the four tracts of land for a tract near by, owned by her stepfather, William Ison, but before Mrs. Ison made Pasha a deed for this tract she and her husband swapped it to one Elijah Ison for another tract of land, and at the request of said Pasha appellants conveyed the land of William Ison, so exchanged, to Elijah Ison. Pasha became of age July 21, 1901, and on July 22 she and her husband George Ison conveyed her interest in her father's land to the appellee herein, R. N. Cornett.

1. This is an action by appellee to quiet his title to the land, although we contend he has neither the title nor the actual possession of the land, both of which are jurisdictional facts without which he can not maintain his action, and his petition should have been dismissed on demurrer.

2. Mrs. George Ison and her husband has not ratified the deed of November, 1896.

3. From plaintiff's conduct he is not entitled to any relief in a court of equity.

4. The deed made by Mrs. George Ison to plaintiff on July 22, 1901, was procured by duress and undue influence.

5. The deed of July 22, 1901, was champertous because at that time the land was in the adverse possession of another.

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AUTHORITIES CITED.

Whiffle v. Earick, 93 Ky., 121; Gately v. Welder, 12 R., 621; Moss v. Gatliff, 11 R., 356; Keller v. Cooper, 12 R., 188; Middleton, &c., v. Hogue, &c., 5 Bush, 478; Hoffert v. Miller, 86 Ky., 574; Bull v. Sevier, 88 Ky., 515; Pomeroy's Equity Jur., vol. 1, sec. 401, vol. 2, sec. 919, 945; Clark on Contracts, pp. 365-6-7 and 8, Kraft's Gdn. v. Koenig, &c., 8 R., 870; Lightfoot v. Wallis, 12 Bush, 499; Kelly on Contracts of Married Women, p. 125; Green v. Scranage, 87 Am. Dec., 449; Eyster v. Hathaway, 99 Am. Dec., 537; Am. & Eng. Ency. of Law, vol. 27 (1st ed.), p. 482; Moore v. Baker, 92 Ky., 520; South's heirs v. Marcum, 22 R., 641; Sutton v. Pollard, 16 R., 635; Bowling's heirs v. Roark, 15 R., 499; Vallandingham v. Johnson, 85 Ky., 288.

W. F. HALL AND T. L. EDELEN, FOR APPELLEE.

The proof in this case is clear and conclusive that the appellants, the mother and stepfather of Pasha Ison at a time when she was an infant only seventeen years of age bought her interest in the land in controversy and took her deed to them, and then to make sure that she would ratify it caused her to make an affidavit that she would make them a new deed when she became of age.

The next day after she became of age she sold the land to the appellee and made him a deed to it, and under this title he brings this suit in equity to have his title quieted against the claim of the appellants.

After appellants got their first deed from this young girl, and the aforesaid affidavit they commenced to cut and destroy the valuable timber on the land, and Wm. Ison admits he realized over $200 from the timber and the rents and profits from the place.

Pasha Ison inherited one-half undivided of the four tracts of land belonging to her father, and her brother, Joseph Creech, owned the other half. By the conveyance of her half to appellee after she became of age, appellee, by his purchase, became a joint tenant with Joseph Creech to the whole of the land subject to the dower interest of the widow of John M. Creech. The possession of one of the joint tenants was the possession of both. This is a principle of law too well settled to require any comment. Vallandingham v. Johnson, 85 Ky., 288; Gardner v. Pace, 11 R., 216; Glass v. Glass, 7 R., 437.

The contracts of infants may be disaffirmed after they arrive at age and the highest character of disaffirmance is the execution of a deed to the same land to a third person. Tyler on Infancy,

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sec. 31; Am. & Eng. Ency. of Law (2d ed.), p. 282; Kent's Com., vol. 2, p. 236; Youse v. Norcinea Am. Dec., vol. 51, p. 175; Patterson v. Lake, 25 Mo., 544; Crisenger v. Welch, 15 Ohio, 156; Craig v. Vanbeber, 18 Am. St. Rep., 569; Searcy v. Hunter, 26 Am. St. Rep., 837; Green v. Green, 25 Am. Rep., 233; Walson v. Belleys, 42 Am. Rep., 1; Moore v. Baker, 92 Ky., 518; Napier v. Chappell's Admr., 22 R., 1904.

On the facts appearing in the record we submit:

1. That under the authority of the Kentucky Statutes, title "Contracts," and under the decision in the case of Moore v. Baker, 92 Ky., 518, construing that section, the appellee Cornett took title, and the judgment for that reason should be affirmed.

2. But in any event, if the action should be reversed the appellant, Ison, under no theory could be entitled to anything except his purchase money, less the amount he has realized by a sale of timber from the land itself.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

John M. Creech died about twenty years ago, leaving a widow and two children, who were both then infants. He owned four tracts of land. Some time after his death the widow intermarried with William Ison, and after this the daughter, Pasha, married George Ison. In the year 1886, when she was seventeen years of age, she and her husband swapped her interest in the four tracts of land owned by her father to her stepfather, William Ison, for a tract of land in Letcher county owned by him, he paying her $50 in addition in the trade. This trade was proposed by her and her husband, and seems to have been much canvassed before it was made. The tract of land which William Ison swapped to her was of the value of $500. So that she got in the trade $550 for her patrimony. He knew that she was only seventeen years of age, and took from her an affidavit that she would make him a deed after she became of age. Before deeds were made under this trade, she and her husband swapped the William Ison tract to Elijah Ison for a tract owned by him, and by agreement William Ison made a deed to Elijah Ison for his tract. Elijah Ison

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conveyed his tract to her, and she conveyed her interest in her father's land to William Ison. She and her husband settled on the tract of land conveyed to her by Elijah Ison, and subsequently, while she was still an infant, conveyed one-half of it to Joseph Holcomb, and made a deed to him for it. After all this, on July 1, 1891, she became of age. The deed which she had made to William Ison for her land had not been recorded, and R. N. Cornett proposed to her husband to pay him $1,100 for it. William Ison heard of this, and on the day that she was of age went to see her, asking her to make him a deed the next day. The next morning he went to see Cornett, telling him of his purchase of the land and requesting him to drop the trade, and offered him $100 to do this. Cornett said he did not want his money for nothing, and Ison told him if he bought the land he would buy a lawsuit. That day Cornett took to her house a deputy clerk, with a deed he had prepared for her to sign. Joseph Holcomb's wife was there with his deed for the purpose of getting that reacknowledged. The proof is conflicting as to which deed was signed first, but from all the evidence we conclude that it was in substance one transaction, and that both deeds should be treated as executed at the same time. Both were on the table together, and the proof leaves the mind in doubt as to which was acknowledged and delivered first. Cornett got his deed and paid the money, and Holcomb's wife got his. Both were properly acknowledged. William Ison was in possession of the land at the time. Cornett paid $1,100 for the land, $800 of it being paid in a stock of goods. Holcomb paid nothing for the acknowledgment of his deed. Pasha Ison and her husband were then living on the remainder of the tract conveyed to her by Elijah Ison, outside of the part conveyed by them to Holcomb, and con-

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tinued to reside there. Before she became of age, William Ison had cut off the land she conveyed to him timber of the value of something over $200 and received the money for it. What she had received for the land conveyed to Holcomb is not shown. Cornett then filed this suit against William Ison to quiet his title to the land. William Ison answered, making his answer a counterclaim, and praying that his title be quieted. The case was submitted to the chancellor, who entered judgment in favor of Cornett, and William Ison appeals.

The proof leaves no sort of doubt that Cornett bought with full knowledge of the previous sale to William Ison and of his claim to the land. It also leaves no sort of doubt that Cornett paid for the land $1,100 in money and property. Each of them earnestly maintains that the other has no equity in his case. The stepfather evidently knowingly made a hard trade with his stepdaughter when an infant, but the husband urged the trade, and there was no fraud in it. Cornett bought with full notice of the prior claim of William Ison; also of the reacknowledgment of the deed to Holcomb, and that he was buying a lawsuit.

The deed of an infant conveying real estate, when any valuable consideration passes to him, is not void, but voidable only, and may be confirmed after his arrival at age by the reacknowledgment of the deed or conduct showing an election to stand by it. Hoffert v. Miller, 86 Ky., 572, 9 R., 732, 6 S. W., 447, and cases cited. After arriving at age he may disaffirm a contract made during infancy for the sale of real property, either executed or executory, by merely making another conveyance of the same property to a third person, and it is unnecessary for him to refund to the first person the consideration received in order to render the

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second conveyance valid. Vallindingham v. Johnson, 85 Ky., 289, 8 R., 940, 3 S. W., 173. The purchaser holding under a deed made by an infant can not rely upon the champerty statute as against the second purchaser, as his holding is not adverse to the infant. Moore v. Baker, 92 Ky., 518, 13 R., 724, 18 S. W., 363. To same effect, see Freeman's note to Craig v. Van Bebber, 18 Am. St. Rep., 657, 703; 16 Am. & Eng. Ency. of Law, 288-293. The fact that Cornett had notice of the claim of Ison did not render his purchase void, for, as has been well said, the privilege of an infant to disaffirm his contract might be of little value to him if he were permitted to dispose of the property previously conveyed, to such persons only as had no notice of the prior conveyance. Jackson v. Burchin, 14 Johns., 124; Clamorgan v. Lane, 9 Mo., 446. It has also been held that if an infant conveys his land, and on attaining his majority ratified his conveyance, and then conveys to another person for a valuable consideration, the first grantee not being in possession, the second grantee, having notice of the deed made in infancy, but no notice of the ratification, is entitled to hold the land. Black v. Hills, 36 Ill., 376, 87 Am. Dec., 224. The rule is thus well stated in 16 Am. & Eng. Ency. of Law, p. 287: "The right of an infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others; and, though its exercise is not infrequently the occasion of injury to those who have in good faith dealt with him, this is a consequence which they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants, and the former can not complain if, as a consequence of their violation of this rule of conduct, they are injured by the exercise of the right with which the

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law has purposely invested the latter, nor charge that the infant, in exercising the right, is guilty of fraud."

Here Cornett had notice of all the facts, and bought with full knowledge of the situation; Ison, the prior purchaser, being in actual possession. But the infant had sold the land to Holcomb before her majority, and, as appears from the proof, had nothing at that time except the little place on which she resided. She was under no obligation to disaffirm her deed made to Holcomb. That deed was not void. It was only voidable. If she did not disaffirm it, it stood good. Ison, when she disaffirmed the deed made to him, could not demand of her, as a condition of that disaffirmance, that she should also disaffirm the deed made to Holcomb. Her acknowledgment, therefore, of the deed made to Holcomb after she became of age, deprived Ison of no legal right. She was under at least a moral obligation to Holcomb after she had disposed of the consideration received from him for the land conveyed to him. Her reacknowledgment of the deed put it out of her power thereafter to disaffirm it. But the same effect would have followed if she had remained silent and taken no action for the statutory period. Ison was in no worse condition after she reacknowledged that deed and disaffirmed his than he would have been if she had disaffirmed his without taking any action as to the Holcomb matter. He would have no claim on the Holcomb land if she had not reacknowledged Holcomb's deed and simply allowed the matter to remain as it was. If she had sold the land to Holcomb after becoming of age a different question would be presented; but when she reacknowledged the deed to him she simply elected not to disaffirm it, as she had the legal right to do, and, no right of Ison being prejudiced thereby, he can not complain. As it is the policy of the

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law to discourage persons from buying the property of infants, and also its policy to encourage persons to buy their property at full value after they become of age without fear of losses by reasons of contracts made during infancy, the interests of this class of persons require that *bona fide* purchasers of their property for value after they have arrived at age should be upheld; for otherwise their property might be sacrificed, as in this case, by a sale at half its value during infancy, and after they arrived at age no one would be willing to buy from them and pay the value of the property.

Pasha Ison is not a party to this suit, and we can not, therefore, determine her rights. But on the facts as presented the real equity of the case is not difficult to see. The disability of infancy is allowed by law as a shield, not as a sword. The infant may disaffirm his contract on becoming of age, and if, during his infancy, he has spent the consideration received, this is nothing more than the law expects of him; but if he still has the consideration, or its representative in money or property, he must, on disaffirming his contract, make restitution to the extent of the consideration still in his hands. Thus, if he gives his note for the price of personal property, and pleads infancy to the note, the title to the property revests in the vendor, and he may recover it in an action in trover. The same principles apply in the case of real estate. Kitchen v. Lee, 11 Paige, 107, 42 Am. Dec., 101; Henry v. Root, 33 N. Y., 526; Carr v. Clough, 59 Am. Dec., 345; 16 Am. & Eng. Ency. of Law 293; Manning v. Johnson, 62 Am. Dec., 732; Brantley v. Wolf, 60 Miss., 433. William Ison was the girl's stepfather. She was small when her own father died, and had grown up in his home. He stood to her *in loco parentis*. In this situation, when she was seventeen years of age, he

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traded her out of her patrimony for $550, and this land, after he had cut over $200 worth of timber from it, sold for $1,100 about four years later, thus showing that the land in its original condition would have been worth over $1,300. The law will not enforce in his favor a contract made with her by him, by which more than half her property was taken from her. The rule is that ratification, to be binding on the infant, must be voluntary—the act of a free mind, and not done under misapprehension. Note to Craig v. Van Bebber, 18 Am. St. Rep., 705. There was no intention on her part to ratify the deed to William Ison. Cornett paid the full value of the property, and a loss should not be thrown upon him. Still she can not use her infancy as a sword, and the chancellor, on a proper application, can do justice between her and William Ison to the extent that she still retains the land that she got from him or its representative, charging him with what he has received from the timber cut off her land, and the reasonable rent while in his possession. Judgment affirmed.

Judge Paynter dissenting.

Petition for rehearing by appellant overruled.

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CASE 9—ACTION BY ELIZABETH THOMPSON'S EXECUTOR AGAINST WILLIAM BROWN AND OTHERS FOR A CONSTRUCTION OF THE WILL OF ELIZABETH THOMPSON, DECEASED.—JUNE 17.

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Thompson's Exr. v. Brown and Others.

APPEAL FROM MARION CIRCUIT COURT.

FROM THE JUDGMENT THE EXECUTOR APPEALS. REVERSED.

WILLS—CHARITABLE BEQUESTS—BENEFICIARIES—CERTAINTY.

Held: A will devising testator's property to her executor, to be by him distributed "to the poor in his discretion," is sufficiently definite, under Kentucky Statutes, 1899, section 317, requiring that gifts for such a purpose shall point out the purpose of the charity, and the beneficiaries thereof, with reasonable certainty.

THOMPSON & SPAULDING, FOR APPELLANTS.

(The original brief of the attorneys for appellant not being in the record, the reporter, in lieu thereof, takes the following suggestions from appellant's brief on petition for a rehearing.)

In appellant's petition for a rehearing we aimed to call the court's attention to the principles established by the courts up to that time, upon the question involved in this action, but had not at that time seen the opinion in the case of Coleman, &c., v. O'Leary's Exr., 24 R., 1248, which seems to have been a better considered case than the one at bar, and upon a similar question under discussion, the court was unanimous in its opinion. The twentieth clause of the O'Leary will involves the same principles as the clause in dispute in this action. Of course, it is impossible to find the words of any two wills alike, but the principle to be settled in these two clauses is the same.

"In the opinion in this case Judge DuRelle claimed that it would require the aid of the ultra cypres doctrine to establish the residuary clause in this will, but established the residuary clause in the O'Leary will involving the same principle. In this case the clause leaves the remainder of testatrix' estate to be distributed to the poor by her executor in his discretion. In the O'Leary will the remainder of the estate was to be invested and placed in trust to the Rt. Rev. Bishop of the Catholic diocese of Louisville, and three others to be chosen by him for the establishment of a home for 'poor Catholic men' as soon as the proceeds of the estate would justify.

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"Now it is admitted that had the testatrix in this case placed a territorial restriction in this residuary clause of her will, it would have been good. Had she said 'the poor of the county, State, or some district of the State,' it would have been good. Is not the clause under discussion in the O'Leary will fully as indefinite in this particular? It does not state where on the face of the earth this home for the 'poor Catholic men' is to be established, nor from what territory the poor Catholic men are to be selected, but the *court* located the home in the city of Louisville, and the selection of the poor 'Catholic men' to the diocese of the city of Louisville, which is the State of Kentucky.

"Now in this case what is the territorial jurisdiction of the executor? It is certainly confined to the State of Kentucky, as under his appointment as executor he has no authority anywhere else. If the court can settle who the beneficiaries are from the poor Catholic men of Kentucky, can't it settle who they are from the poor persons of the State? The petition alleges that she had always lived in this State, and in the county where the will was made, and where she died, and it would be a rash presumption to indulge that this good woman intended her executor would ever go out of the State to find the objects of her bounty under this devise."

CITATIONS.

Coleman v. O'Leary, 24 R., 1248; Curling Case, 8 Dana, 38; Atty. Genl. v. Wallace, 7 B. Mon., 612.

H. P. COOPER, ATTORNEY FOR APPELLEES.

This appeal involves the construction of item eleven of the will, which is as follows:

"I will and direct that my house and lot in Raywick be sold at such time and on such terms as my executor may deem best, and I will that the proceeds, together with whatever other estate I may have after the payment of the aforesaid bequest and funeral expenses, shall be collected by my executor and by him distributed to the poor in his discretion."

Your honors will observe that the "poor" named in the will were not designated by age, number, color, or sex, nor by any creed, church, or school district. They were not located in any district, county, or State. It is impossible for the chancellor to judicially identify the beneficiaries under this clause, and it was therefore his duty to declare the same void. Cromie's Heirs v. Louisville Orphan Home, 3 Bush, 374; Leeds v. Shaw's Admr., 82 Ky., 82; Spalding, &c., v. St. Joseph Industrial School, 21 R., 1107; Civil Code, sec. 25.

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OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REHEARING GRANTED, ORIGINAL OPINION WITHDRAWN AND CASE REVERSED.
For original opinion see 24 R., 1066; 70 S. W., 674.

The eleventh clause of the will of Elizabeth Thompson, who died in September, 1897, reads as follows: "I will and direct that my house and lot in Raywick, Ky., be sold at such time and on such terms as my executor may deem best, and I will that the proceeds together with whatever other estate I may have after the payment of the aforesaid bequest and funeral expenses shall be collected by my executor, and by him distributed to the poor in his discretion." The only question for decision upon this appeal is whether the gift in this clause is sufficiently definite to be enforceable under section 317 of the Kentucky Statutes of 1899, which requires that such gifts shall point out with reasonable certainty the purpose of the charity and the beneficiaries thereof. Very different rules from those that are applied in establishing and administering private trusts will be applied in order to give effect to the intention of a donor to establish a public charity. In discussing this question, Perry on Trusts, section 687, uses this language: "If in a gift for private benefit the *cestuis que trustent* are so uncertain that they can not be identified, or can not come into court and claim the benefit conferred upon them, the gift will fail. But if the gift is made for a public, charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain and indefinite. Indeed, it is said that vagueness is in some respects essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins." The general doctrine upon the question of charitable bequests is that the beneficiaries should be designated as a class only, leaving the number

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and individuals to be determined by the trustees who administer it. Devises for the poor have always been favorite modes of dispensing charity by benevolent persons, and trusts created for this purpose have been generally upheld by the courts. In Moore's Heirs v. Moore's Devisees, 34 Ky., 354, 29 Am. Dec., 417, it was decided: "When an ascertainable object is designated by the donor in general and collectible terms, as the poor of a given county or parish, or when a person is appointed by him to select a described portion or kind or number from a designated class, the chancellor, sitting as judge in equity, will interpose on the ground of trust." In the case of Curling's Adm'rs v. Curling's Heirs, 8 Dana, 38, 33 Am. Dec., 475, James Curling left the residue of his estate for the use and benefit of a public seminary, not designating where it was to be located. The circuit judge held the devise void for uncertainty, but, upon appeal to this court, Judge Robertson, delivering the opinion of the court, said: "The testratrix, by designating a general object of charity (a public seminary), must be understood as intending either a seminary, or the seminary of his county, or any seminary which his executor or a court of equity, in the exercise of a sound discretion, should select as best adapted to effect the object of charity. Upon either of these hypotheses, the testator's purpose, as declared and circumscribed by himself, may be fulfilled by applying the fund to a specific object, without any hazard of perverting his bounty in a manner not contemplated by him and authorized by his will. Therefore, according to principles established as perfectly judicial, we are of the opinion that the devise created a charitable trust, which may be executed according to law, and without violating the will of the testator or making a will for him, and therefore we conclude that the circuit court ought to

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have decreed the appropriation of the profits of the devise to the use of the Trigg Seminary, and appointed a trustee to execute the trust." In the very recent case of Spalding v. St. Joseph's Industrial School, 107 Ky., 382, 21 R., 1107, 54 S. W., 206, Judge DuRelle uses this language: "All the Kentucky cases have sustained the charitable uses therein considered because the court held that a charitable object was indicated, or a class of charitable objects designated from which choice was authorized to be made. In some of them there is room for difference of opinion as to the certainty of the objects of the charitable uses sustained, but the courts have always held that they were certain, either by being designated by the donor, or one of a class designated by him from which choice was authorized to be made." In Bedford v. Bedford's Adm'r, 99 Ky., 273, 18 R., 193, 35 S. W., 926, the devise was to the State of Kentucky in trust for the benefit of the State, the profits therefrom to be appropriated annually forever towards the education of the children of the State—particularly the poor and most unintelligent. The devise in this case was sustained as sufficiently definite. The court said: "Trusts must be for the benefit of an indefinite number of persons, for, if the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity, and which distinguishes it from a mere private trust."

There has been considerable diversity in the decisions of the courts of the various States of the Union as to the extent they will go in upholding an indefinite trust. In some States—particularly Maryland, Virginia, Michigan, New York and Wisconsin—it has been held that courts of equity have no greater jurisdiction to enforce public than private trusts. On the other hand, in Kentucky, Maine, Massachusetts, Missouri, Pennsylvania and many other

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States where the principles of 43 Eliz., c. 4, are accepted, they have gone to the farthest limit in this regard. In this State sixteen decisions have been reported upon this question of charitable uses, beginning with the case of Glass and Bonta v. Read, 2 Dana, 170, in which charitable bequests have been uniformly upheld. But it is insisted that the amendment to section 317 of the Kentucky Statutes passed by the General Assembly in 1893, which is in these words, "if the grant, devise, gift, appointment or assignment, shall have pointed out with reasonable certainty the purposes of the charity and the beneficiaries thereof," etc., was intended by the lawmaking department of the government to change the rule which has heretofore prevailed in this State. The words of the amendment are the same as those used in several opinions sustaining bequests to various charities, and it would be more consistent with reason and common sense to believe that the Legislature simply intended to crystallize into the statute law the doctrine which has been so often announced by this court, and which has been accepted with approval by the profession, the General Assembly, the public at large, and by most eminent text-writers. The gift in this case is to the poor as a class, and the testratrix has appointed her executor to select from this class the persons who are to receive the benefit of the charity. In our opinion, the judgment of the trial court is in conflict with what has become the settled legislative policy in this State with respect to public charities; and Spalding v. St. Joseph's Industrial School, 107 Ky., 382, 21 R., 1107, 54 S. W., 206, relied on to support the judgment of the trial court, is not in conflict with the other cases, and the devise in this case should be upheld.

For reasons indicated, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

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CASE 10—ACTION BY J. D. SHORTELL AGAINST GREEN COUNTY TO RECOVER ON PAST DUE COUPONS ON GREEN COUNTY BONDS SUBSCRIBED TO THE C. & O. R. R. CO.—JUNE 17.

Green County v. Shortell.

APPEAL FROM GREEN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

COUNTIES—BOND ISSUE—SUBSCRIPTION TO RAILROAD—CONDITIONS OF ISSUANCE—NOTICE TO PURCHASERS—DUTY TO SEARCH—NONCOMPLIANCE—ESTOPPEL—PAYMENT OF INTEREST.

Held: 1. Where bonds issued by a county in subscription to railroad stock contained no recitals as to the authority of the officers issuing them, or as to the performance of preliminaries requisite to their issuance, there was no estoppel on the county to plead a noncompliance with such conditions, and that they were issued without authority of law.

2. Where the charter of a railroad (1 Sess. Acts 1869, p. 463, chap. 1578) vested in the company power to construct a road through certain counties, and, in exception to the general law of the State, empowered any of such counties to subscribe to stock, issuing bonds therefor, on such conditions as it might deem fit, and a county did issue bonds on specified conditions to be performed by the railroad, which were not printed on the bonds, but appeared on the orders of record in the county court, a purchaser of such bonds was charged with notice of the conditions upon which they were to be issued, a noncompliance with which would be available as a defense to a suit by him on the bonds.

3. In pursuance of legislative authority, a railroad company filed in the county court a request that there be submitted to the qualified voters the question as to whether the county should subscribe for capital stock of the company, issuing its bonds therefor, upon the condition that the company should construct its road through the county, and within one mile of a certain town, and also upon the further condition that the bonds should not be issued, or the county pay any part of either principal or interest, until it should be exonerated from payment of a subscription to the stock of a certain other road. The issue was ordered at an election held for that purpose, and all the orders made in pursuance thereof were conditioned as stated. HELD, that properly construed, the exoneration was a condition preced-

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ant, after which the bonds could be issued, but would not be binding in the event of a failure on the part of the railroad to comply with the other condition.

4. An order of the county court directing the clerk to make a subscription to certain railroad stock on behalf of the county, and on the terms specified in the order submitting the question to a vote, was a direction to the clerk to do a merely ministerial act, vested in him no discretion, and was not an invalid delegation of the power vested in the county court to make the subscription.

5. Where by its charter a railroad company was to be built entirely across the State, and, by the terms of the subscription to stock of the road by a certain county through which it passed, bonds were issued, conditioned on the road's being constructed through the county, a subsequent construction by a successor of such road of four and a half miles of railroad in the county was not a substantial compliance with the conditions of the bond issue.

6. Payment of interest on bonds by a county for some years does not estop it to show their invalidity.

ERNEST MACPHERSON, JOHN W. LEWIS AND D. T. TOWLES, ATTORNEYS FOR APPELLANT, GREEN COUNTY.

CLASSIFICATION OF POINTS.

1. Conditional subscriptions to stock in the Cumberland & Ohio Railroad Company were expressly authorized by its charter. Shelby County Court v. Cumberland & Ohio R. R. Co., 8 Bush, 217. Such also is the general law in the absence, from the charter or law authorizing the subscription, of a prohibition of conditional subscriptions to stock, the subscriber may impose such conditions as he may choose. Jack v. City of Helena, 41 Ark., 213; Atchison, &c., R. R. Co. v. Jefferson Co., 21 Kan., 309; Portland, &c., R. R. Co. v. Hartford, 58 Me., 23; 2 Elliott R. R., sec. 852; Brown v. Gibson Co., 73 Ind., 543; People v. Holden, 91 Ill., 466; Coe v. Caledonia, &c., R. R. Co., 27 Minn., 197; Penobscot, &c., R. R. v. Dunn, 39 Me., 587; Milwaukee, &c., R. R. v. Field, 12 Wis., 340; Hanover Junction, &c., R. R. v. Haldeman, 82 Pa. St., 36; Connecticut, &c., R. R. v. Baxter, 39 Vt.; Missouri P. R. R. v. Tygard, 84 No. 264.

2. Where the location and construction of a railway is not made as required by the conditions, bonds issued in payment are invalid even in the hands of a *bona fide* holder. Chicago, &c., R. R. v. Marseilles, 84 Ill., 145; Mellen v. Lansing, 19 Blatchford, 512; Bucksport, &c., R. R. v. Brewer, 67 Me., 295.

3. The purchaser of municipal bonds is bound to take notice

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of the law under which the bonds are issued. Barnett v. Denison, 145 U. S., 139.

4. The federal courts have established the rule that in the absence of a recital in a municipal bond that the conditions precedent to its validity have been performed, it is open to the municipality to show the nonperformance of the conditions. County of Chambers v. Clews, 88 U. S., 321; Citizens' Savings Association v. Perry County, 156 U. S., 701; Buchanan v. Litchfield, 102 U. S., 292; Town of Coloma v. Eaves, 92 U. S., 481, remarks of Justice Bradley; Provident Life and Trust Co. v. County of Mercer, 170 U. S., 601; Carroll County v. Smith, 111 U. S., 556; School District v. Stone, 106 U. S., 183-187; Hopper v. Town of Covington, 118 U. S., 148.

6. Where bonds purporting to have been issued by a municipality contain no recitals, but are mere naked promises to pay, every purchaser and holder of the securities is chargeable with notice of whatever appears upon the face of the records. Lewis v. Commissioners of Bourbon Co., 12 Kan., 186; Marsh v. Fulton Co., 10 Wall., 676; Pendleton v. Amy, 13 Wall., 297; Commissioners of Knox Co. v. Aspinwall, 21 How., 539; Bissell v. City of Jeffersonville, 24 How., 287; Hopp v. Trustees of Brown Tp., 13 Ohio St., 311; State v. Trustees of Union Tp., 15 Ohio St., 437; Clark v. City of Des Moines, 19 Iowa, 199; Veeder v. Town of Lymon, 19 Wis., 298; Starin v. Town of Genoa, 23 N. Y., 439; Gould v. Town of Sterling, 23 N. Y., 456; The People v. Mead, 24 N. Y., 114; 36 N. Y., 224.

6. No municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it. Justice Bradley, in Chisholm v. Montgomery, 2 Woods, 584. A person dealing with an agent must look to his authority. Snow v. Warner, 10 Met. (Mass.), 136; Reese v. Medlock, 27 Tex., 120. The rule is strictly applied to the powers of public officers. Mayor and City Council of Baltimore v. Reynolds, 20 Maryland, 1; Marsh v. Fulton Co., 10 Wall., 683; State v. Daviess Co., 64 Mo., 30; People v. Supervisors, Town of Waynesville, 88 Ill., 469; Town of Plattsville v. Galena, &c., R. R. Co., 43 Wis., 493; Board, &c., of Douglass v. Walbridge, 38 Wis., 179.

7. The validity and effect of municipal bonds are determined always by the law of the place where the obligation is made. Dixon Co. v. Field, 111 U. S., 83. This proposition seems to be assumed as a matter of course in the federal courts.

8. The county judge could not delegate to the railroad the duties confided to him by the people. "This is an official trust which neither a county court nor its successor, the board of supervisors, could delegate to strangers owing no obligation to

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the county." Board of Jackson Co. v. Brush, 77 Ill., 59. He had no right to issue bonds in a form other than that voted by the people.

9. The word "through," as used in the order submitting the vote to the people, meant from end to end and from side to side. "Act to incorporate the Cumberland and Ohio Railroad Company," Acts of 1869, vol. 1, pages 463-474, the opening words of section 15; the language of section 18, showing a road was contemplated from "the Ohio River" through many named counties, including Green, "to a point on the boundary line between the States of Kentucky and Tennessee" "with a view of connecting with the Southern system of railways converging at Nashville, Tennessee;" the condition read that the road shall "run through Green county and within one mile of the town of Greensburg." The whole conditional contract "is to be taken together, and to have a reasonable construction according to the intent of the parties." Peoples' Ferry Co. v. Balch, 74 Mass., 303-312. All the circumstances prove that the people understood that they were contracting for a complete line to run through the county from side to side. The language of the condition must be construed according to its ordinary meaning; that is, as it would be understood by the voters. People v. Town of Clayton, 88 Ill., 45.

10. The payment of interest on the bonds for a few years does not estop the county from contesting the validity of the bonds. Mercer County v. Provident Life and Trust Co., 19 Circuit Court of Appeals, 58; Ashuelot National Bank v. School District, 41 Fed., 514; State v. School District, 16 Nebraska, 182; Graves v. Saline County, 161 U. S., 373.

11. The county judge without associating with himself the justices of the peace had no power to act on the petition for subscription or otherwise. 3d Proviso to section 15 of the charter; Bowling Green and Madisonville Railroad Co. v. Warren County, 10 Bush, 711; "herein" in the proviso referred only to the powers therein given to the county court. Spring v. Collector, 78 Ill., 101; Exp. Partington, 6 Q. B., 649-653; McGill v. Municipal Council, 12 U. C. Q. B., 44.

12. If these bonds and coupons are to be treated as put upon the footing of bills of exchange the five-year limitation should apply under our statutes.

13. If the court should reverse the judgment, which was given on the pleadings, and the amended answer of appellant contained any defense, the court below should be directed to enter judgment for Green county, Civil Code, sec. 386; Eaves v. Stone, 80 Ky., 78; Enc. of Pleading and Prac., vol. 11, p. 914.

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GEORGE W. JOLLY, ATTORNEY FOR APPELLEE.

A bond payable to the order of the president of the railroad company and endorsed in blank is equivalent to making it payable to the bearer and renders it transferable by mere delivery and thus converts it into commercial paper. Daniel on Neg. Insts., sec. 693.

The charter expressly required the Green county bonds to be issued in negotiable form. The language is: "All said bonds shall be payable to bearer, with coupons attached, bearing any rate of interest not to exceed six per cent. per annum payable semi-annually *in the city of New York*, and payable at such time as they may designate, not exceeding thirty years from date: . . ." No more appropriate word could have been selected than the word "bearer" to make the bonds negotiable. The Legislature could have intended nothing else by the use of that word. A great number of the decisions of the Supreme Court of the United States, and all, or practically all, of the decisions of the State courts had then declared that the use of that word in municipal bonds enabled them to be transferred by mere manual delivery like an ordinary greenback bill or national bank note, and clothed such instruments with all the qualities and incidents of commercial paper. And this court had more than ten years before these bonds were issued decided the law to be so in this State. And the law thus declared was re-affirmed by Judge Cofer ten years later.

The statute (Ky. Stats., sec. 474) relative to the assignment of bonds, notes, etc., has been in force more than fifty years, but it has never been supposed by the bar or courts of this State that it had any application to municipal bonds. If so, it surely could not have escaped the attention of this court in considering the cases in 2d Metcalf and 78 Ky., above cited. In Virginia, a similar statute was held to have no application to county bonds payable to holders, such bonds being held to be negotiable. Arents v. Commonwealth, 18 Gratton, 750.

The decisions of this court in the German-American Title Company cases do not, as counsel for appellant seem to suppose, apply. It is sufficient to say of those bonds that they were not municipal bonds. They were made by private persons and were not made negotiable at a bank, and were not negotiated.

What matters it, therefore, that the word "negotiable" was not used in the charter, when it prescribed in express terms that the bonds "*shall* be made payable to *bearer*?"

The Green county bonds were issued and delivered to the railroad company and the railroad company placed them on the market and they were sold to the public, the plaintiff buying

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some of them. The purchaser before parting with his money was bound to ascertain whether there was legislative authority to issue the bonds. Having found the act it was next his duty to ascertain whether the required election had been held and whether a majority of the votes cast at that election were cast in favor of the subscription. He would have ascertained that the election had been duly held according to law and that a majority had voted for the subscription. That the fact was ascertained by the county court and so determined and entered upon the order book of that court. Having ascertained these facts, it was not necessary for him to look farther. These facts demonstrate conclusively and beyond controversy that the power to issue the bonds had vested in the county judge. Whether a purchaser in fact went to the trouble of ascertaining these facts or not, he is chargeable with knowledge of them, but chargeable with nothing more. That this is the law in this State, and this country is susceptible of absolute demonstration, if any proposition of law is so. Section 1537 of Daniel on Negotiable Instruments, together with the authorities cited by the author, is sufficient.

The law relative to recitals in municipal bonds has no place in this case. No court has ever held that any sort of recitals added any force or effect to the negotiability of a municipal bond. If municipal bonds are payable to bearer they are not less negotiable because they contain no recitals. Recitals in municipal bonds are never of the slightest consequence except for the purpose of creating an estoppel against the municipality where the municipality undertakes to defend against such bonds by alleging the nonperformance of some precedent condition necessary to the vesting of the power to issue the bonds in the officer who executed them. It has been held in a number of cases that the municipalities were estopped to show that the precedent fact or act did not in fact exist or had not in fact been performed, where, according to the statute under which the bond was issued, the officer who executed the bond was also authorized to determine whether the fact or act existed, or had been performed.

In this case power to issue the bonds vested in the county judge of the Green county court and the bonds issued were within the scope of his delegated authority. And the bonds issued being payable to bearer in conformity with the express provisions of the statute, and appellee, a third party, having bought the bonds before maturity, for a valuable consideration, is a bona fide holder and entitled to recover.

There is an attempt made in the answer at this late day, after a lapse of thirty years, and in the face of the decisions of

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this court reported in eighth and tenth of Bush, above cited, to show that the Green county court had no power to subscribe for stock or issue bonds because, as defendant construes the language of section 15 of the charter, power to subscribe was confined to counties through which the "proposed road shall pass;" that is to say, the contention is, that the railroad must first pass through the county, before the county court of such county had jurisdiction to submit the question of making a subscription to a vote or of subscribing for stock or issuing bonds in discharge of the subscription.

The proposed road according to the charter, passed through the counties of Henry, Shelby, Spencer, Nelson, Washington, Marion, Taylor, Green, Barren, Allen, Metcalf and Larue. When the language of section 15 is read in connection with other provisions of the charter, especially sections 1 and 12 and the whole scheme as disclosed in the act is considered, it is manifest that the object of the Legislature was to authorize all of said counties to subscribe for stock in the railroad company and issue their bonds respectively for the amount of stock subscribed. It was certainly not contemplated that the road should be built through a county before the county court had jurisdiction under the act to submit the question of subscribing stock to a popular vote and making a subscription if the vote was favorable thereto and issuing the bonds of the county. In the cases before this court, heretofore referred to, no such construction was ever contended for. It remained alone for the learned counsel who are representing the appellant in this case to originate a theory which the learned and astute lawyers who practiced the case reported in 8 Bush, and the two cases in 10 Bush entirely overlooked.

When this case was here before on appeal, after the decision was rendered, the county filed a petition for a rehearing in which much stress was laid on the fact that the bond contained no recital of the various steps necessary to the vesting of the power to issue the bonds in the county court. That is, that the bonds do not recite that an election had been held under the act at which a majority of the votes cast were in favor of the subscription, that a subscription for stock had been made and that the bonds were issued in discharge or payment of the subscription, etc.

The recital of the existence of those facts or the due performance of those acts, in the face of the bonds, is not at all necessary to their validity.

It is essential to the validity of the bonds that an election should have been held and that a majority of the votes cast

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should be in favor of making a subscription; otherwise, the power conferred by the act could not vest in the county court. It is sufficient if the facts appear upon the records of the county court. And the existence of all the precedent conditions necessary to the vesting of the power in the county court appears by express averments of the answer and the copies of the orders of the county court filed with it and made part of it. The county court ascertained and determined that the election was duly held at the several voting places in Green county according to law, on July 3, 1869; that a majority of the qualified voters decided at that election that the county should subscribe for $250,000 of the capital stock of the railroad company and the subscription was made on the order book of the county court as were also the orders for the issual of the bonds.

There were no recitals in the Daviess county bonds, but they were all held valid, except the over-issue. The order of the county court in that case submitted the question of subscribing for $250,000 of stock in the railroad company and the order of the county court directed the issual of $250,000 of bonds in discharge of that subscription. But the county judge issued bonds to the amount of $320,000, being $70,450 in excess of the amount authorized. This excess was held void by this court and by the Supreme Court of the United States on the ground that no power vested under the act and vote to issue more than $250,000 of bonds. (Daviess County Court v. Howard, 13 Bush, 101, and Daviess County v. Dickinson, 117 U. S., 657.)

There is a line of cases in the supreme court and those cases have been generally followed, holding that in a contest between a bona fide holder of municipal bonds payable to bearer and the municipality, if the bond contains a recital that a precedent condition has been performed or exists, and the officer who executes the bond is authorized by law to ascertain and decide, whether the condition has been performed, or the fact exists and he certifies in the face of the bonds that it does exist or has been performed, then the municipality will be estopped, as against such holder, to deny or dispute the recital, though the recital may be in fact untrue. See Lydne v. County, 16 Wallace, 13, and the other cases collected in the opinion in the National Life Ins. Co. v. Board of Education, 62 Fed. Rep., 792.

Learned counsel for the county seem to suppose that in the absence of recitals in the bonds which create an estoppel that then in such case, notwithstanding the fact that the bonds are negotiable in form and are conclusively shown to have been issued by authority of law, are nevertheless no more than mere promissory notes, and are now open to all the defenses which

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might be made against such contracts. But this is not law. If there was power to issue the bonds they are perfect obligations and being negotiable in form the holder is entitled to recover except as there was lack of power to issue the bonds and "bad faith," and no want of power is shown or bad faith alleged. Daniel so states the law and supports his statement by the highest English and American authorities.

It is only in those cases where in fact the power to issue the bonds did not vest in the municipal agency, but where that agency was authorized to determine and declare whether or not the act or condition upon which the vesting of the power was made to depend, had been performed or existed, and did determine that the act or fact existed, and so certified in the face of the bonds and being the agency authorized to execute and deliver the bonds, that the municipality has been held to be estopped to dispute the fact certified in the bonds as against a bona fide holder.

The only defense open to a municipality when sued on its bonds, payable to bearer, is that of want of power to issue them. If power to issue the bonds is shown to have vested in the agency of the municipality, and that agency executes the power conferred, and does not exceed it, that is the end of the controversy, and the contracts are perfect obligations of the municipality.

The county, as the court sees, is here presenting two inconsistent defenses: First, it contends that the county court did not make any subscription or issue any bonds of the county; then, it turns about and in the next breath says the county made a subscription and issued the bonds, but it did so upon conditions, which conditions have never been performed and the bonds for that reason are void.

It does not even take the trouble to say that either one of these supposed defenses is *true*, or that it does not know which of them is true.

They are utterly inconsistent. It can not be that there was no power and at the same time that there was power.

If the county judge sitting alone as the county court had no power to receive and entertain the request of the railroad commissioners to submit the question to a vote of the people of subscribing the stock, no power to order an election to be held, no power to make the subscription, and no power to issue the bonds, he certainly had no power to impose the conditions. If he had power as contended by the county, to impose the conditions, he must have had power to have done all the other acts which are now assailed as *ultra vires* and void.

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Counsel for appellant in the oral argument expressly admitted and conceded it to be a fact that Green county for several years immediately after the issual of these bonds had levied and collected taxes for the payment of the interest and had regularly paid the interest on them. And in the brief, signed by all the counsel for appellant, it is conceded as a fact "that the coupons for interest were for a few years paid."

It is true that if there was no power in the Green county court to issue the bonds, the levy of taxes to pay the interest on the bonds and the payment of the taxes by the people and the disbursement of the taxes collected in the payment of the coupons "for a few years," or any time, would not amount to or constitute a ratification, or create an estoppel, that would preclude the county from afterwards showing that there was no power to issue the bonds. To hold otherwise would be equivalent to saying that the county might by such indirect acts make a contract which it had not the power to make directly. Marsh v. Fulton Co., 10 Wallace, 696.

But the levy and collection of taxes for the purpose of paying interest on the bonds and the payment of the taxes by the people and the disbursement of the tax so collected in payment of the interest coupons "for a few years," does amount to an effectual ratification, and does create an estoppel in pais, if power to issue the bonds vested in the county court and judge and that delegated authority was executed in an irregular or imperfect manner.

As there was undoubtedly power, under the charter and vote to issue the bonds, vested in the Green county court and Judge Barnett, if the power was in any respect irregularly executed or performed, the levy of taxes by the county court to pay interest on them, and the collection and disbursement of it in payment of the interest on the bonds "for a few years" after their issue, ratifies such irregular execution of the power, and effectually estops the county to set up or rely upon such irregularities, no matter what they may be. Marshal County v. Schenek, 5 Wallace, 772; Campbell v. City of Kenosha, 5 Wallace, 195; Burr v. Charlton County, 12 Fed. Rep., 604; Mills v. Gleason, 11 Wis., 470, 78 Am. Decs., 721; Brown v. Bon Homme County, 46 N. W. Rep., 173; Beach on Pub. Corps., sec. 904.

It seems to us that public policy, the highest considerations for the public welfare and the commercial credit of the State, all dictate that there should be no modification of the law relative to the integrity of municipal bonds as it has existed in the State since the decision of this court in Maddox v. Graham and Knox, supra. If it were now held that bonds payable to bearer,

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bought by a third person, before maturity, for a valuable consideration, where there was legislative authority and a vote of the people authorizing their issue, and not ultra vires, were, in effect nonnegotiable, were open to defenses, it would impair the credit of every municipality in the State. It would render difficult if not impracticable the sale of any such securities in the commercial markets of the country. Certainly no such paper could ever hereafter be negotiated at all except, as there had been prior to the issue of such bonds a litigation, either by proceedings for a mandamus to compel their issue, or by a suit in equity to enjoin their issue, whereby every question touching the validity of their issue could be rendered *res adjudicata*. No doubt the excellent credit now enjoyed by the municipalities of Kentucky is due mainly, if not entirely, to the fact that ever since the decision of this court in Maddox v. Graham and Knox the principles of that case have been steadily adhered to, and the law of Kentucky relating to municipal bonds considered to be substantially the same as the law relating to such securities as declared by the Supreme Court of the United States.

Many of the cities and counties of this State have within the past five years negotiated their bonds for very large amounts, bearing four per cent. interest at a price from one to five per cent. above par. The city of Louisville during the present month (April, 1903) has negotiated a large amount of its bonds bearing three and one-half per cent. interest at a price above par. These facts are so notorious that it is presumed, though they do not appear in the record, a statement of them is not inappropriate.

Therefore, not only does the law, but public policy, also, as we most respectfully submit, require an affirmance of the judgment of the Green Circuit Court in this case.

CITATIONS.

An act to incorporate the Cumberland and Ohio Railroad Company, approved February 24, 1869. Acts 1869, vol. 1, pp. 463, 474; Shortell v. Green County, 22 Ky. Law Rep., 1010, 23 Ky. Law Rep., 144; Mercer County Court and Garrard County Court v. Ky. River Navigation Co., 8 Bush, 300; Slack v. Maysville, &c., R. R. Co., 13 B. Mon., 1; Shelby County Court v. C. & O. R. R. Co., 8 Bush, 209; C. & O. R. R. Co. v. Washington County Court, 10 Bush, 564; C. & O. R. R. Co. v. Barren County Court, 10 Bush, 604; Bowling Green, &c., R. R. Co. v. Warren County Court, 10 Bush, 711; Provident Trust Co. v. Mercer County, 170 U. S., 602; Daviess County Court v. Howard, 13 Bush, 101; Daviess County Court v. Dickinson, 117 U. S., 657; Gill v. Cubitt,

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3 Barn. & Cres., 466; Goodman v. Harvey, 4 Ald. & El., 870; Swift v. Tyson, 16 Peters, 1; Goodman v. Simonds, 22 How., 96; Murray v. Lardner, 2 Wall., 110; Lynde v. County, 16 Wallace, 13; National Life Insurance Co. v. Board of Education, 62 Fed. Rep., 792, court of appeals case, and the authorities cited; Mercer County v. Hackett, 1 Wallace, 83; Thompson v. Lee County, 3 Wallace, 331; Lexington v. Butler, 14 Wallace, 295; Daniel on Negotiable Instruments, secs. 1500, 1501, 1503, 1537; Maddox v. Graham and Knox, 2 Met., 56; Greenwell v. Hayden, 78 Ky., 333; Arents v. Commonwealth 18 Gratton, 750; Marsh v. Fulton Co., 10 Wallace, 676; Marshall Co. v. Schenck, 5 Wallace, 772; Campbell v. City of Kenosha, 5 Wallace, 195; Burr v. Charlton Co., 12 Fed. Rep., 604; Mills v. Gleason, 11 Wis., 470, 78 Am. Dec., 721; Brown v. Bon Homme Co., 46 N. W. Rep., 173; Beach on Pub. Corp., sec. 904.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

The Cumberland & Ohio Railroad Company was incorporated by an act approved February 24, 1869 (1 Sess. Acts, 1869, p. 463, c. 1578). It was vested with power to construct and operate a railroad from the Ohio river, through the counties of Henry, Shelby, Washington, Nelson, Marion, Taylor, Green, Barren and Allen, to a point on the boundary line between the States of Kentucky and Tennessee, "to be selected by the president and directors, about due north from the town of Murfreesboro, Tennessee, with a view of connecting with the southern systems of railways converging at Nashville, Tennessee." See Charter, section 12 (1 Sess. Acts, 1869, p. 468, c. 1578). Any city, town or county through which the proposed road should pass was authorized to subscribe stock in the railroad company in any amount it desired, and to issue bonds therefor, payable to bearer, with coupons attached, bearing interest not exceeding 6 per cent., payable in the city of New York at not more than thirty years from date; but, before any such subscription should be valid, the question of making it should be submitted to the qualified voters of the munic-

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ipality, and a majority of the qualified voters voting at the election should be in favor of the subscription. Id., p. 471, c. 1578, section 15. The charter authorized subscriptions to be made upon such conditions as might be deemed fit. In construing it in Shelby County Court v. Cumberland & Ohio Railroad Co., 71 Ky., 209, this court said: "The president and directors of the railroad company are not only expressly vested by the twelfth section of the act of 1869, supra, 'with all the powers and rights necessary to the construction' of the road, but the sixteenth section provides that the company 'shall have all the powers and privileges conferred' on the 'Louisville & Nashville Railroad Company by the laws of Kentucky for constructing and operating their said road not herein specified and granted, and not in conflict with the term of this charter;' and, by section 22 of the charter of the Louisville & Nashville Railroad Company, the county courts of counties through which that road passes are expressly authorized to submit to the voters of their counties propositions for subscribing for stock in that corporation, 'if by them deemed expedient, in such manner as they may direct and prescribe.' And by the sixth section of an act to amend the same charter, approved January 17, 1856 (1 Acts 1855-56, p. 184, c. 20), counties, towns, cities and other corporations are authorized, in express terms, to subscribe for stock in that road, 'with such terms and time of payment, conditions annexed, and kind of payment that may be set forth in the subscription.'"

At its June term, 1869, the following request was filed in the Green county court: "We, the undersigned commissioners of the Cumberland & Ohio Railroad Company, hereby request that the county court of Green county submit to a vote of the qualified voters of said county the question

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whether said county shall subscribe, for and on behalf of said county, and in pursuance of the provisions of the charter of said railroad company, two hundred and fifty thousand dollars to the capital stock of said company, payable in the bonds of said county, having twenty years to run, and bearing six per cent. interest from date, upon the conditions that said company shall locate and construct said railroad through Green county, and within one mile of the town of Greensburg, in the said county, and shall expend the amount so subscribed within the limits of Green county, and also upon the further condition that said bonds shall not be issued, or said county pay any part of either principal or interest on said amount subscribed as aforesaid, until said county of Green shall be fully and completely exonerated from the payment of the capital stock subscribed by the county court of said county, for and on behalf of said county, to the Elizabethtown and Tennessee Railroad Company." The county court thereupon made the following order: "Whereas, the commissioners of the Cumberland & Ohio Railroad Company, by virtue of the authority delegated to them by the charter of said company, have requested the county court of Green county to order an election in said county of Green, and submit to the qualified voters of said county the question whether said county court shall subscribe, for and on behalf of said county, two hundred and fifty thousand dollars to the capital stock of the Cumberland & Ohio Railroad Company, having twenty years to run, and bearing six per cent. interest from date, and payable in the bonds of said county, upon conditions that said company shall locate and construct said railroad through the county of Green, and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green

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county, and also upon the further condition that said bonds shall not be issued, or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad Company, until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green county court to the Elizabethtown & Tennessee Railroad, or any part of the interest thereon. It is therefore ordered by the court that an election by the qualified voters of Green county, at the several voting places in said county, be held and conducted by the several officers, as prescribed by law, holding elections, on the 3d day of July 1869, to vote on the question as to whether or not the said county court of Green county, shall, for and on behalf of said county, subscribe two hundred and fifty thousand dollars to the capital stock of the said Cumberland & Ohio Railroad, conditioned and to be paid as above stated." The election was held, resulting in a vote in favor of the subscription, and at its June term, 1870, the county court entered the following order: "Whereas, in pursuance of an order of this court made on the 17th day of June, 1869, an election was held in said county of Green on the 3d day of July, 1869, at the several precincts in said county, and it appearing that a majority of the qualified voters at said election decided that the county of Green should subscribe for two hundred and fifty thousand dollars of the capital stock of the Cumberland & Ohio Railroad Company: Now, it further appearing that said election was held in conformity with the law, and in accordance with the provisions of the charter of the company, now, therefore, I, Thomas R. Barnett, the presiding judge of the Green county court, by virtue of the authority in me vested by law, and to carry out the wishes of said voters,

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do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of the Cumberland & Ohio Railroad Company, for and on behalf of the said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is made with the condition set out in the order of this court ordering said election, and now on record in the office of this county." At its October term, 1871, this further order was made: "On motion of E. H. Hobson, director of the Cumberland & Ohio Railroad, it is ordered that Z. F. Smith, president of the Cumberland & Ohio Railroad, be, and he is hereby, authorized to have printed for the county of Green the bonds, to the amount of two hundred and fifty thousand dollars, the amount of subscription of Green county to said railroad, in the following denominations, to-wit (the same to be conditioned as specified in the order submitting the vote of the said county): 125 bonds at $1,000, $125,000; 200 bonds at $500, $100,000; 250 bonds at $100, $25,000." At the January term, 1872, bonds to the amount of $1,300 were ordered to be issued, and at the February term, $5,000 more. At the April term, 1872, the following order was entered: "Application was this day made to the presiding judge of the county court of Green county by the president and board of directors of the Cumberland & Ohio Railroad Company to issue the balance of the bonds of said county, to the amount of the subscription of said county of Green, to the said Cumberland & Ohio Railroad Company; and, the court being sufficiently advised, it is ordered by the court that the balance of said bonds be, and they are hereby, ordered to be issued, to be signed by the judge of said county court of Green county, and countersigned by the clerk of said court, as required by the charter of said company." Under this order the bonds here

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in controversy were issued. They read as follows: "United States of America. County of Green, State of Kentucky. For the Cumberland and Ohio Railroad. Twenty years after date, the county of Green, in the State of Kentucky, will pay to the holder of this bond the sum of ——— with interest thereon at the rate of six per cent. per annum, payable semi-annually upon presentation of the proper coupons hereto attached, principal and interest, being payable at the Bank of America, in the city of New York. In testimony whereof, the judge of the said county of Green has hereunto set his hand and affixed the seal of said county, on the 1st day of April, A. D. 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached."

Appellee, James D. Shortell, is the holder of six of these bonds, each for the sum of $1,000, and of one bond for $500. He filed this suit against the county of Green to recover on the past-due coupons. The county pleaded in defense of the suit the conditions above set out. On the former appeal a demurrer was sustained to the answer on the ground that it did not state the facts relied on sufficiently to raise the question aimed to be presented. See Shortell v. Green County, 22 R., 1010, 59 S. W., 522, 23 R., 144, 63 S. W., 979. On the return of the case to the circuit court, the answer was amended so as to set out all the facts above stated, and it was pleaded that the conditions upon which the subscription was made had not been complied with; that the Cumberland & Ohio Railroad failed to erect or construct a line of railroad through Green county, or within one mile of the town of Greensburg; that there is no railroad now, and never was any railroad, running through Green county; that no part of the amount subscribed was ever spent in Green county in the construction of any railroad

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therein, and that the county was not exonerated from the payment of the capital stock voted by it to the Elizabethtown & Tennessee Railroad; that the conditions prescribed in the subscription were all disregarded and never fulfilled; and that the bonds were issued without authority of law, in violation of the rights of the taxpayers of Green county. The court sustained a demurrer to the answer, and the defendant appeals.

It is conceded that the appellee is a bona fide purchaser of the bonds, without notice of the defense now set up by the county, and the question to be determined is whether, notwithstanding this, the defense relied on is good against him. In determining this question, an important distinction is made by the authorities between those bonds which contain recitals certifying that the preliminary requisites for the issue of municipal bonds have all been complied with, and bonds containing no such recitals. Thus in Citizens' Savings Association v. Perry County, 156 U. S., 701, 15 Sup. Ct., 550, 39 L. Ed., 585, the United States Supreme Court said: "But it is urged that, the bonds having been executed and issued by those whose duty it was to execute and issue them whenever that could be rightfully done, the county is estopped to plead their invalidity as between it and the bona fide purchaser for value. This argument would have force if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrine of this court, the county would be estopped to deny the truth of the recital as against bona fide holders for value. But this court in Buchanan v. Litchfield, 102 U. S., 278 (26 L. Ed., 138), upon full consideration, held that the mere fact that the bonds were issued without any recital of the circumstances bringing them within the pow-

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er granted was not of itself conclusive proof, in favor of a bona fide holder, that the circumstances existed which authorized them to be issued." See, to same effect, Town of Coloma v. Eaves, 92 U. S., 484, 23 L. Ed., 579; School District v. Stone, 106 U. S., 183, 1 Sup. Ct., 84, 27 L. Ed., 90; Carroll County v. Smith, 111 U. S., 556, 4 Sup. Ct., 539, 28 L. Ed., 517; Hopper v. Town of Covington, 118 U. S., 148, 6 Sup. Ct., 1025, 30 L. Ed., 190. This doctrine was recently reaffirmed in the case of Provident Life & Trust Co. v. Mercer County, 170 U. S., 593, 18 Sup. Ct., 788, 42 L. Ed., 1156. The bonds in question containing no recitals as to the authority of the officers issuing them, or as to the performance of the preliminaries requisite to their issuance, there is no estoppel on the county to plead the truth of these matters. Municipal corporations are simply agents of the State for local purposes, and possess merely such powers as are expressly given, or may be properly implied because essential to effectuate what is expressly granted. 1 Dillon on Municipal Corporations, section 189; Ottawa v. Carey, 108 U. S., 110, 2 Sup. Ct., 361, 27 L. Ed., 669. The officers of a municipality have only such powers as are conferred upon them by law, and all persons dealing with them are required to take notice of the extent of their authority, because all persons are required to take notice of the laws of the land. Mayor of Baltimore v. Reynolds (Md.) 83 Am. Dec., 535; Marsh v. Fulton County, 10 Wall., 683, 19 L. Ed., 1040. When the bonds of Green county were offered upon the market, every person buying them was put upon notice that the counties of this State had no authority to issue bonds of this character by the general laws of the State, and that the bonds in question were not binding on the county unless issued by special legislative authority. It

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was therefore incumbent upon all before buying these bonds to learn by what authority they were issued. It was shown by the bonds that they were issued "for the Cumberland and Ohio Railroad." They were made payable to the holder. When the purchaser looked to the charter of the Cumberland & Ohio Railroad, he was informed by it that the county court could only issue the bonds of the county after the question of making the subscription had been submitted to the qualified voters, and a majority of them had voted in favor of the subscription. He was also informed that the county might make a subscription on such conditions as it saw fit. There being nothing on the face of the bonds to advise him on these matters, it was incumbent on him, before buying paper which was invalid in the absence of express authority in the officials, to look to the record, and see under what circumstances these bonds had come into existence. When he looked to the record of the Green county court, which, under the act, he was bound to know would set forth the facts, he was apprised that the subscription was made upon the conditions that the company would locate and construct its railroad through Green county, and within one mile of the town of Greensburg, and would expend the amount so subscribed within the limits of Green county, and also upon the further condition that the bonds should not be issued, or the county pay any part of either principal or interest, until it was fully exonerated from the subscription to the Elizabethtown & Tennessee Railroad Company. He was also notified that, in the order of the court under which the vote was taken, it was expressly submitted whether the county would subscribe $250,000 to the capital stock of the Cumberland & Ohio Railroad, "conditioned and to be paid as above stated," and that in the order making the subscription it was stipulated, "This sub-

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scription is made with the condition set out in the order of this court ordering said election and now on record in the office of this county." He was further notified that, in the order directing the bonds to be printed, it was provided, "the same to be conditioned as specified in the order submitting the vote of the said county." These orders of the county court were the authority under which the bonds were issued, and the only authority which the officers issuing them had. They plainly disclosed the fact not only that the subscription was conditional, but that it was "to be paid as above stated," and that the bonds were "to be conditioned as specified in the order submitting the vote." The county officials had no authority to issue a bond not conditioned as specified in the order submitting the vote, for the subscription was expressly conditioned, and only to be paid on condition. If the county officials had followed the order of the county court, and issued bonds conditioned as specified in the order submitting the vote, the bonds, on their face, would have informed every purchaser of the conditions on which they were voted. But when the county officials neglected to do this, and issued instead a naked promise to pay, without any recital of the authority under which it was issued, the purchaser was put upon inquiry as to their authority, and their want of authority is as available against him as the facts pleaded would have been, had they followed their authority, and conditioned the bonds as specified in the order submitting the vote. In executing the bonds in their present form, the county officials may have supposed that the rights of the county were sufficiently protected by the orders entered in the county court. The rule on the subject is thus stated in Hainer on Municipal Securities, section 413: "Where bonds purporting to have been issued by a municipality contain no recitals of

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an election, or of proceedings and orders of the municipality, but are mere naked promises to pay, every purchaser and holder of the securities is chargeable with notice of whatever appears upon the face of the records. If in such case it appears upon the face of the records that the commissioners had no authority to issue the bonds, the municipality could avail itself of that want of authority as a defense to an action even by a bona fide holder. When the laws or constitutional provisions relating to the issuance of county bonds point to the county records as evidence of facts required to authorize their issuance, such records, and not the recitals in the bonds, must be looked to by all persons proposing to deal in them." In Lewis v. Bourbon County Com'rs., 12 Kan., 216, the court, by Judge Brewer, said: "Every one dealing with the commissioners or purchasing such securities must take notice of the law under which they act. . . . That these bonds are negotiable paper does not alter the case. The law merchant does not make the act of an agent proof of his authority." In Veeder v. Town of Lima, 19 Wis., 287, the court, by Chief Justice Dixon, said, after referring to similar statutory provisions as in the act referred to: "These provisions mark very clearly to my mind the intention of the Legislature that all persons negotiating for the bonds, whether directly with the supervisor or with third parties, must look to the records, and govern themselves accordingly. They are public records, open at all times to inspection; or, if in any cases it is inconvenient or impracticable, transcripts can be had at a trifling expense." In Cooley on Constitutional Limitations, in a note to side page 217, after collecting many authorities as to the effect of recitals in such bonds, and quoting at length from Gould v. Town of Sterling, 23 N. Y., 464, which is to the effect that the municipality is not

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bound by recitals in bonds, if unauthorized, the distinguished author says: "It is, of course, impossible to reconcile these authorities, but the doctrine in the case of Gould v. Town of Sterling appears to us to be sound, and that, wherever a want of power exists, a purchaser of the security is chargeable with notice of it, if the defect is disclosed by the corporate records, or, as in that case, by other records, where the power is required to be shown."

It is insisted, however, for appellee, that, by the terms of the subscription, it was made upon the condition that the bonds should not be issued, or the county pay any part of either the principal or interest of the amount subscribed, until the county was exonerated from the payment of its subscription to the Elizabethtown & Tennessee Railroad. It is urged that this part of the condition was made precedent to the issuing of the bonds, but that the rest of the condition, to the effect that the company should locate and construct its road through Green county, or within one mile of Greensburg, and expend the amount subscribed in Green county, was not made a condition precedent to the issue of the bonds, and therefore only an obligation was imposed upon the railroad company, for the performance of which the county only looked to it. It is also insisted that it is shown by the record that the subscription to the Elizabethtown & Tennessee Railroad was void. We can not concur in either of these conclusions. The meaning of the contract, taken as a whole, is that the subscription is upon the condition that the company shall locate and construct its railroad through Green county, and within one mile of Greensburg, and expend the amount subscribed in the limits of Green county; and the further condition is added that the bonds are not to be issued, or anything paid on account of the subscription, until the county is exonerated

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from its former subscription to the Elizabethtown & Tennessee Railroad. In other words, the bonds are not to be issued until this release is made, and after the release is made the bonds may be issued, but they are to be subject to the condition that the company should locate and construct its road as above set out. The railroad authorities, in applying to the county court for a vote on this subject, intended by their petition for the people of the county to understand that, before any liability was created, the old subscription to the Elizabethtown & Tennessee Railroad was to be out of the way entirely, and that after this was done the promise of the county to pay was to be conditioned on the location and construction of the road through Green county, and within one mile of the town of Greensburg. In construing the contract, the court must bear in mind that it was a proposition submitted by the railroad company to be voted on by the people of Green county, and that construction must be adopted which was clearly contemplated by the parties at the time. The railroad company intended the people to understand, and the people understood, from the paper when they voted on the subscription, that they were to get a railroad through the county, and that, if they did not get it, their subscriptions, being "conditioned and to be paid as above stated," would not be binding upon the county. That this was the understanding of the parties is conclusively shown by the order of the county court, made on the motion of the railroad company, directing the bonds to be printed, "the same to be conditioned as specified in the order submitting the vote of the said county." As to the matter of the subscription to the Elizabethtown & Tennessee Railroad, the record shows the following order of the county court, made on May 20, 1868: "This day T. R. Barnett, presiding judge, and D.

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T. Towles, clerk, of the Green county court, produced their certificate in words and figures as follows, viz.: 'We, T. R. Barnett, presiding judge, and D. T. Towles, clerk, of the Green county court, duly authorized to compare the pollbooks of Green county, certify that at an election held in said county at the various voting places in said county on the 16th day of May, 1868, on the question whether the county court of Green county shall, for and on behalf of said county, subscribe for 3,000 shares of the capital stock of the Elizabethtown & Tennessee Railroad Company, to be paid for in the bonds of said county, payable in twenty years, and bearing six per cent. interest, payable semi-annually in the city of New York, with interest coupons attached thereto, and that 586 votes were cast for said subscription, and 204 against said subscription. May 20th, 1868. T. R. Barnett. D. T. Towles.' It is therefore ordered by the court that the said vote be and is now entered of record as follows, to-wit: 586 votes were cast for said subscription, and 204 votes were cast against said subscription, showing that there is a majority for said subscription of 382 votes. It is now, therefore, ordered that the clerk of this court, for and on behalf of the county of Green, make said subscription on the terms specified in the order submitting the question to a vote as aforesaid."

It is insisted that the order is void because the county court, instead of making the subscription, delegated this duty to its clerk; and Mercer County Court v. Kentucky River Navigation Company, 71 Ky., 300, is relied on. But in that case the order of the county court appointing the commissioner to make the subscription contained these words: "But said commissioner is directed not to subscribe said stock, or any part thereof, until said company shall, by proper orders entered on the books, agree that no part

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of their subscription shall be mortgaged under the provisions of the tenth section of the act of the Kentucky Legislature incorporating said company, nor shall the county of Mercer be in any manner bound for the subscription herein decreed to be made until said company has accepted it upon the conditions herein set forth." It was held that the power of the county court to make the subscription, being conferred by law, must be exercised by it, and that it could not confer upon a commissioner the power to determine important questions submitted for its determination. The ground of the decision was that there was no subscription unless certain things were done, and the commissioner was to determine whether these things were done, and thus, by the exercise of his discretion, determine whether the subscription should be made, whereas the law had vested this discretion alone in the county court. But the case before us is wholly different. No discretion is conferred upon the county clerk. He is simply directed absolutely to do a clerical act. County courts can not conveniently sign subscription papers or documents of this kind, and for convenience such bodies usually act by a commissioner or agent in the discharge of the mere clerical duty of signing the papers. Such a course of doing the business has been often sustained. 23 Am. & Eng. Ency. of Law (2d Ed.) 365; Miller v. New York, 109 U. S., 385, 3 Sup. Ct., 228, 27 L. Ed., 971; Birdsall v. Clark (N. Y.) 29 Am. Rep., 105; Burrill v. Nahant Bank (Mass.) 35 Am. Dec., 395; Dillon on Mun. Corp., section 60. As the case is here only on demurrer, the question is not presented on whether the subscription was in fact made.

Again it is urged that four and one-half miles of railroad have been built in Green county by a successor of the Cumberland & Ohio Railroad Company, and this is relied on

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as a compliance with the condition of the contract, under the case of Providence Trust Co. v. Mercer County, 170 U. S., 602, 18 Sup. Ct., 788, 42 L. Ed., 1156; but that case rests on the peculiar facts there shown, it being held, in effect, that the contract was substantially complied with. This is not the case here. There has been no substantial compliance with the contract. The road was to be built from the Ohio river to the Tennessee line, and the subscription was made on the condition that it was to be paid when the road was constructed through Green county. It has never been constructed through Green county, nor does its construction in any manner approximate a fulfillment of the conditions. To hold that there has been a compliance with the terms of the contract would be to give no effect to the natural meaning of the language used. Peoples' Ferry Co. v. Balch, 74 Mass., 303; Memphis, &c., Ry. Co. v. Thompson, 24 Kan., 170.

The fact that the county paid the interest on the bonds for a few years does not estop it to show their invalidity. Norton v. Shelby County, 118 U. S., 425, 6 Sup. Ct., 1121, 30 L. Ed., 178; District Tp. of Doon v. Cummins, 142 U. S., 366, 12 Sup. Ct., 220, 35 L. Ed., 1044; Mercer County v. Providence Life & Trust Co., 72 Fed., 623, 19 C. C. A., 58; Graves v. Saline Co., 161 U. S., 373, 16 Sup. Ct., 526, 40 L. Ed., 732.

We, therefore, conclude that, upon the facts shown, the county of Green is not liable upon the bonds sued on, and that the court should have overruled the demurrer to the answer. As the case was submitted both on a demurrer and a motion for judgment, notwithstanding the answer, we will not now direct a judgment to be entered for the defendant. As the bonds in contest contain no recitals, no opinion is intimated on the conflict of authority referred

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to by Judge Cooley as to whether municipal officers issuing bonds without authority can estop the municipality by reciting in the bonds that they have such authority.

Judgment reversed and cause remanded for further proceedings not inconsistent herewith.

Whole court sitting, except Judge Settle, who declined to sit in the case.

Petition for rehearing by appellee overruled.

CASE 11—ACTION BY THE CITY OF LOUISVILLE AGAINST THE LOUISVILLE & N. R. R. CO. AND L. R. FIGG FOR COST OF STREET IMPROVEMENT. —JUNE 17.

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p116 856

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p116 856

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Figg v. Louisville & N. R. R. Co.
City of Louisville v. Figg.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

FROM THE JUDGMENT FIGG AND THE CITY OF LOUISVILLE SEPARATELY APPEAL. REVERSED.

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—RAILROAD RIGHT OF WAY—LIABILITY FOR ASSESSMENT.

1. A strip of land appropriated to use by a railroad as a right of way, is a "lot" within the meaning of the statute governing street improvements and is liable to an assessment for a street improvement.

H. L. STONE, ATTORNEY FOR CITY OF LOUISVILLE.

The question involved in this appeal is whether or not the property or right of way of the L. & N. R. R. Co. within the area defined by the city ordinance is subject to the statutory lien in favor of the contractor for street improvements.

The railroad company contends that it is not (1) because its property was not benefited by the improvement; (2) because it had been withdrawn from the ordinary use for which town lots are appropriated and had become a part of the railway essential to its operation, and it is not within the policy of the law subjecting town lots to such local burdens.

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In the City of Ludlow v. Trustees of the Cincinnati Southern Railway, 78 Ky., 357, decided March 4, 1880, this court in an opinion by Judge Hines held that a lot upon the street owned by the said railway company was subject to an assessment for the improvement of such street by the city of Ludlow, and the fact that the lot was the property of the railroad company and used for railroad purposes furnished no more reason why it should be exempt from an assessment than if it belonged to a natural person. The same contentions were made in that case as are made by defendant, L. & N. R. R. Co. in its answer, viz.: (1) That its property was not benefited by the improvement, and it had been withdrawn from the ordinary use for which town lots are appropriated and had become a part of the railway essential to its operation, and it was not within the policy of the law subjecting town lots to such local burden. There it appeared that *the lot supported a portion of the masonry of the road-bed*, and was essential to the proper drainage of the track. The assessment was made on the lots in proportion to the number of front feet and in accordance with the provisions of the charter of the city of Ludlow. As to the first objection the court said "that the lot was not benefited by the improvement of the street is sufficiently answered by the action of McFerran v. Alloway, 14 Bush, 580." Judge Hines quotes with approval the language in the case referred to as follows:

"This court has so often determined that such power existed in the Legislature that it is no longer an open question, and the benefits to be derived by those living in the locality of the improvement, having been determined by the Legislature in passing the act under which the tax was imposed, this court has no revisory power over it. In the judgment of the Legislature this taxing district *is* benefited by the improvement, and the fact that an actual benefit is not derived by one living in a remote part of the district, or where it is difficult to approach the road or highway, is no argument against the imposition of the burden."

Furthermore, Judge Hines said (Ib., 360):

"The passage of the ordinance by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement, and of the question of benefit to the owners of abutting property." (Northern Ind. R. R. Co. v. Connelly, 10 Ohio St., 164.)

With reference to the second position contended for by the railroad company's counsel, that *the lot was necessary for the operation of the railway*, and it is contrary to public policy to subject it to such burden, the court after reviewing the authorities cited by the railroad company's counsel, holding that the

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property of a railroad company could not be sold in parcels to satisfy a lien or tax, said (Ib., 362):

"These cases bear upon the case under consideration in so far as to furnish a rule of construction for statutes laying local burdens upon such *quasi* public corporations as railroads, but when the rule is applied to *assessments* for local improvements, where the statute directs that the property assessed be sold to satisfy the claim, and *directs the manner in which it shall be sold*, it will be found *not to forbid the fragmentary sales* against which those cases are directed."

Still further, in support of the conclusion reached, Judge Hines states (Ib., 362-63):

"But if there were any doubt on this point, we would not hesitate, on the authority of the L., C. & Lex. R. R. Co., and the Louisville Transfer Co. v. Obst & Stengel, decided by this court in February, 1875, to hold that the property of the company should be sold to satisfy the assessment. In that case the *road-bed* and the grounds belonging to the company were directed *to be sold* to satisfy a sum assessed against the companies *for street improvement*, and under a charter of the city of Louisville, similar in this respect to the charter of the city of Ludlow. In the opinion in that case, which was delivered by Judge Lindsay, who delivered the opinion in the Elizabethtown and Paducah railroad case it is said: 'Real property held by railroad companies within the corporate limits of the city of Louisville is *not exempt* from street taxation. The terms of the grant of the power to tax for such purposes includes *all real estate*, and that held by railroad companies, like that held by churches, colleges, hospitals and other institutions of like character, must bear its proportion of the local burden. There is no constitutional restriction upon the power of the Legislature to impose local taxation upon railroad companies. It is a mere question of policy.'"

Judge Hines then proceeds to quote authorities in other States, many of which have already been cited in this brief, and the opinion is concluded as follows:

"We think that, both upon reason and authority, a lot held and owned by the railway company, as this is held and used, is as much subject to assessment for street improvement as if it belonged to a natural person. In the law authorizing the assessment *there is no exemption of railroad property*, nor exemption of property because of its application to *certain* uses."

It will be observed by the court that the authorities cited and approved by this court in the opinion rendered by Judge Hines, nearly all are cases where the *right of way* of the railroad com-

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pany was sought to be subjected to the assessment for local improvements. In the Ludlow case the lot sought to be subjected really *formed a part of the railway company's right of way*, as it supported the masonry that upheld the tracks of the railroad company in the city of Ludlow. In other words, if it had been sold under the lien for the local assessment and purchased by a stranger, the railroad company's operation of its railroad would have been materially interfered with, but that appears not to have formed any valid objection to the enforcement of the lien.

It will be observed that said railroad company by its answer (Ib., 36) expressly alleges and claims that it owns and holds a *perpetual* right of way for railroad purposes from its station in Louisville, Kentucky, to Nashville, Tennessee, over a strip of land 185 miles in length and 66 feet or more in width and that this right of way includes the portion of land described in the petition in this action. This *perpetual* right of way practically, and to all intents and purposes, amounts to the fee simple title. But it is unimportant what kind of title the said railroad company owns or holds. *All* real estate within the area of the district subject to this local assessment must stand the burden thereof, and the lien of the contractor for the cost of the original improvement of Magnolia avenue attached thereto, and should, under the statute, ordinance and apportionment of the cost, as shown by this record, be enforced by the court.

B. F. WASHER AND WM. FURLONG, FOR L. R. FIGG.

The question of the right of way of the railroad company being liable for the municipal assessment, counsel wishes to call attention to the recent book published in 1903, "The Modern Law of Municipal Corporation," by John W. Smith. In vol. 2, sec. 1239, the author says:

"Where the statute authorizes assessment for local improvements against abutting property the right of way of a railroad company is assessable. . . . The right of way of a railroad company is subject to special taxation for a local improvement."

To support the foregoing text, the author cites the following cases:

"Indianapolis & R. Co. v. Capitol Paving Co., 24 Ind. App., 114; s. c., 54 N. E., 1076; Chicago & R. Co. v. City of Milwaukee, 89 Wis., 506; s. c., 62 N. W., 417; Peru & R. Co. v. Hanna, 68 Ind., 562; Pittsburg & R. Co. v. Hays, 17 Ind. App., 261; s. c., 44 N. E., 375; 45 N. E., 675; 46 N. E., 597; State v. City of Passaic, 54 N. J. L., 340; s. c., 23 Atl., 945; Louisville & R. Co. v. State, 8 Ind. App., 377; s. c., 35 N. E., 916; Lake Erie &

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R. Co. v. Bowker, 9 Ind. App., 428; s. c., 36 N. E., 864; Louisville & R. Co. v. Boney, 117 Ind., 501; s. c., 20 N. E., 432."

"Chicago & R. Co. v. Village of Emhurst, 165 Ill., 148; s. c., 46 N. E., 437; Chicago & R. Co. v. City of Joliet, 153 Ill., 649; s. c., 39 N. E., 1077; Chicago & R. Co. v. People, 120 Ill., 101; s. c., 11 N. E., 418; Payne v. Village of South Springfield, 161 Ill., 285; s. c., 43 N. E., 1105; Illinois & R. Co. v. City of Mattoon, 141 Ill., 32; s. c., 30 N. E., 773; Illinois & R. Co. v. City of Chicago, 141 Ill., 509; s. c., 30 N. E., 1036; Kuehner v. City of Freeport, 143 Ill., 92; s. c., 32 N. E., 372; Rich v. City of Chicago, 152 Ill., 18; s. c., 38 N. E., 255; Illinois & R. Co. v. Commissioners, 129 Ill., 417; s. c., 38 N. E., 925; Drainage Comrs. v. Illinois & R. Co., 158 Ill., 353; s. c., 41 N. E., 1037; Illinois & R. Co. v. City of Decatur, 126 Ill., 92; s. c., 18 N. E., 315; Illinois & R. Co. v. City of Decatur, 147 U. S., 190; s. c., 13 S. St., 293; Illinois & R. Co. v. City of Decatur, 154 Ill., 173; s. c., 38 N. E., 626; Chicago & R. Co. v. City of Quincy, 136 Ill., 563; s. c., 27 N. E., 192; Chicago & R. Co. v. City of Moline, 158 Ill., 64; s. c., 41 N. E., 577; Freeport St. R. Co. v. City of Freeport, 151 Ill., 451; s. c., 38 N. E., 137; Pittsburg & R. Co. v. Hays, 17 Ind. App., 261; s. c., 44 N. E., 375."

If the judgment against the city of Louisville is affirmed, of course the contractor, L. R. Figg, is not much interested in the remaining question, but should the judgment against the city of Louisville be reversed, then we think the judgment against the railroad company would also be reversed and the company held for the assessment.

HELM, BRUCE & HELM, ATTORNEYS FOR APPELLEE.

CONCLUSION.

In conclusion, therefore, we submit the following propositions viz.:

1. The property of the railroad company sought to be subjected to this special tax is only an easement, viz., a right of way.

2. It is not benefited, but rather is injured, by the improvement of the street in question.

3. A railroad right of way is not a "lot" within the meaning of the statute governing street improvements.

4. To require the owner of this right of way, which is not benefited, but rather is injured, by the improvement of this street, to pay part of the cost thereof, would be to deprive him of his property without due process of law.

AUTHORITIES.

1. Title of L. & N. R. Co. is only to an easement, viz., a right of way. 3 Elliott on Railroads, sec. 972; Kelly v. Donahue, 2

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Met., 482; Morris v. Schollsville, &c., Turnpike Co., 6 Bush, 671; Washington Cemetery Co. v. Prospect Park R. R., 68 N. Y., 593; Clark v. Worcester, 125 Mass., 230; L. & N. R. Co. Charter, Acts 1849-50, p. 427.

2. A railroad right of way is not a "lot" within the meaning of the assessment statute. Ky. Stats., secs. 2833 and 2834; L. & N. R. R. Co. v. Com., 106 Ky., 638; Owen Tyler v. L. & N. R. R. Co., 23 Ky. Law Rep., 827; City of Allegheny v. West Pa. R. Co., 138 Pa. St., 375; 21 Atl. Rep., 763; Chicago, &c., Ry. Co. v. City of Ottumwa, 112 Iowa, 300; 83 N. W., 1074.

3. No constitutional power to assess part of the cost of improving a street upon a railroad right of way not benefited thereby. Norwood v. Baker, 172 U. S., 269; French v. Barber Asphalt Co., 181 U. S., 325; White v. City of Tacoma, 109 Fed. Rep., 32; Barfield v. Gleason, 23 Ky. Law Rep., 128; Chicago, &c., Ry. Co. v. City of Milwaukee, 89 Wis., 506; 62 N. W., 417; Detroit, &c., R. Co. v. City of Grand Rapids, 106 Mich., 13; 63 N. W., 1007; N. Y. & N. H. R. Co. v. City of New Haven, 42 Conn., 279; 19 Am. Rep., 535; New Jersey, &c., R. Co. v. City of Elizabeth, 37 N. J. L., 330.

AUTHORITIES EXAMINED.

Ill. Cent. R. Co. v. Decatur, 147 U. S., 190; City of Bloomington v. Chicago, &c., Ry. Co., 134 Ill., 451; 26 N. E., 366; Northern Indiana R. Co. v. Connelly, 10 Ohio St., 159; Peru, &c., R. Co. v. Hanna, 68 Ind., 567; City of New Haven v. Fair Haven, &c., R. Co., 38 Conn., 422; 9 Am. Rep., 399; Paterson, &c., R. Co. v. City of Passaic, 54 N. J. L., 340; City of Ludlow v. Cin. Sou. Ry. Co., 78 Ky., 357; L. C. & L. Ry. Co. v. Obst & Stengel, Mss. Op.

OPINION OF THE COURT BY JUDGE PAYNTER—REVERSING.

The main line of the Louisville & Nashville Railroad Company runs southwardly from near Tenth and Broadway streets, Louisville, Ky., to and beyond Nashville, Tenn. Its right of way is 60 feet in width. Under appropriate proceedings in the general council, Magnolia avenue was improved by original construction, and the taxing district was properly designated. Within that district, east of Seventh street and south of Magnolia avenue, is a parcel of land 60 feet wide, used by the appellee as a roadbed, or

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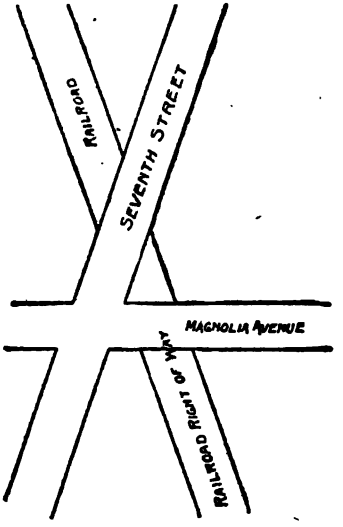
what is commonly called the "right of way," and, as a part of it, a triangular parcel north of Magnolia avenue and east of Seventh street. The local situation is shown by the following plot.



It is insisted on behalf of the railroad company that (1) the property sought to be subjected to part of the cost of street improvement is only a right of way, and therefore can not be charged therewith; (2) it receives no benefit from the improvement; (3) the right of way is not a lot, in the meaning of the statute governing street improvements.

It is not the intangible right to use it, but the strip of land which the railroad company appropriates for its use, and upon which it builds its roadbed, is its right of way. The railroad company has been in possession of the strip of land in question for 50 years. It is a part of a great railroad system. Its right of way is perpetual. In Elizabethtown, Lexington & Big Sandy R. Co. v. Combs, 10 Bush, 393, 19 Am. Rep., 67, the court held the injury resulting from the location of a railroad in such proximity to adja-

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cent property as that smoke, soot, and fire from passing engines was thrown or blown into or upon it, entitled the owner to a single recovery, as the injury was permanent and enduring. In other words, the court regarded that the railroad had appropriated for all time to come, and the injury would be permanent. It is the very remotest possibility imaginable that the appellee would ever abandon its right of way. The court concludes that its use of its right of way will be perpetual. It is therefore practically the owner of the land. If this strip of land was not occupied by the railroad company as a right of way, it would not be suggested that it was not subject to the special tax for street improvement. The purpose for which the lot is used can not affect the question of its liability for the cost of street improvement. Counsel for appellee calls attention to cases of other courts holding that rights of way can not be charged with the cost of street improvements, while, on the other hand, counsel for the appellant calls attention to cases in other courts holding that such rights of way are liable for such cost. It is not necessary to discuss this class of cases further, because this court, in Louisville, Cincinnati & Lexington R. Co. and Louisville Railroad Transfer Co. v. Obst and Stengel, MS. opinion, Feb. 23, 1875, and City of Ludlow v. Cincinnati Southern R. Co., 78 Ky., 357, held that such special taxation could be imposed.

On the second question we quote from Preston v. Rudd, etc., 84 Ky., 156, 7 R., 806, which reads as follows: "Such assessments are made upon the assumption that a portion of the community are specially benefited by the improvement. The principle is that the terrtory is benefited, that it has a common interest, and that, governed by equitable rules, it must equally bear the burden. Necessarily, indi-

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vidual cases of hardship will arise, but it approaches equality as nearly as it is practicable. It follows that a lot owner may be compelled to pay his proportion of the cost of improvement, although in his particular case his property may not be benefited. This rule, however, can not be so extended as to entirely take from the citizen his property. This would work a manifest injustice. It would be spoliation, and not taxation. Under the guise of benefit and taxation, he can not be thus arbitrarily deprived of his property. It would be but an appropriation of it, by the exercise of arbitrary power, to public use, without compensation. . . ." We do not understand that Barfield, etc., v. Gleason, etc., 111 Ky., 491, 23 R., 1102, 63 S. W., 964, changes the rule announced in Preston v. Rudd, etc., and other cases of this court. Spoliation is not shown in this case. Under the statute governing street improvement, a lot is any piece of land within the territory defined by the statute or the general council, where the territory to be assessed is not bounded by principal streets. The use or nonuse, or the character of the use to which the parcel of land is put, does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way was a lot, in the meaning of the statutes, and to thus appropriate it can not change its character.

The judgment is reversed for proceedings consistent with this opinion.

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CASE 12—ACTION BY HENRIETTA DAVIS' ADMR. AGAINST CHESAPEAKE & OHIO RY. CO. AND OTHERS TO RECOVER DAMAGES FOR THE DEATH OF PLAINTIFF'S INTESTATE.—JUNE 17.

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p122 400
116 144
135 521

Davis' Admr. v. Chesapeake & O. Ry. Co.

APPEAL FROM LEWIS CIRCUIT COURT.

FROM A JUDGMENT REMOVING THE ACTION TO THE FEDERAL COURT PLAINTIFF APPEALS. AFFIRMED.

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—FOREIGN CORPORATIONS—COMPLIANCE WITH STATE LAW—EFFECT—JOINDER OF DOMESTIC CORPORATION—JOINDER OF RESIDENT SERVANTS—SUFFICIENCY OF PETITION—RAILROADS—CROSSING INJURIES—PRIVATE CROSSINGS—TRESPASSERS—PLEADINGS—CONSTRUCTION.

Held: 1. A compliance by a foreign railroad corporation with Constitution, section 211, and Kentucky Statutes (1899), section 841, the former providing that such corporations shall not be entitled to the right of eminent domain, or have power to acquire a right of way or real estate, until they shall have become bodies corporate in accordance with the laws of the Commonwealth, and the latter prescribing the manner of such incorporation, does not render the corporation a citizen of the State in such sense as to deprive it of the right to remove to the Federal court actions instituted against it by a citizen of the State.

2. In an action against a foreign railroad corporation, an amended petition, tendered after the filing by defendant of a petition for removal of the cause to the Federal court, making a domestic corporation, original defendant's lessor, a party, came too late to prevent the removal.

3. An allegation in a petition that plaintiff's intestate was killed "at or near" a private crossing should be construed to mean that she was killed at a place on the track other than the crossing.

4. A failure to slacken the speed of a train, or to give signals at an approach to private crossings, is not negligence.

5. In an action against a railroad for injuries at a private crossing, near a public crossing, where there was no averment that signals usually given on the approach of trains to the public crossing could have been heard at the private crossing, and the distance

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between the crossings was not given, but a bare statement that they were "near" together, the question of defendant's negligence in failing to give signals at the public crossing, on which plaintiff could rely, was not raised.

6. Those in charge of a train owe a trespasser on the tracks of the railroad no duty, except to use reasonable care to save him after discovering his peril, and, if injured, he can not rely for a recovery against the railroad on alleged negligence in failing to give signals on approach to either a private or public crossing.

7. In order to prevent a removal of an action for injuries against a foreign railroad company to the Federal court, by joining as defendants resident servants of the railroad in charge of the train causing the injury, the petition must state a good cause of action against the servants so joined.

A. E. COLE & SON, FOR APPELLANT.

POINTS AND AUTHORITIES RELIED ON.

1. By objecting on two separate occasions to the amended petition, to-wit: On January 24th and 27th, and causing the court to pass upon the merits thereof, even though erroneously, the appellee, C. & O. Ry. Co., made a general appearance in the action as did the other defendants, and thereby waived any alleged right to have this case transferred to the Federal court. Ency. of Pl. & Pr., vol. 8, p. 156, also 632; Patrick v. Swinney, 5 Bush, 421; Maxwell v. Kirkpatrick, 29 Kan., 679; Stevens v. Harris, 99 Mich., 230; 52 Mich., 524; 59 Mich., 214; Herd v. Cist, 20 S. W., 1035 (Ky.); Duncan v. Wickliffe, 4 Met., 118; Virginia, &c., Steam Nav. Co. v. U. S. Ganey, U. S., 418; School Dist. v. Griner, 5 Kan., 224; McCabe's Admx. v. Maysville & Big Sandy Ry. Co., 23 R., 2328.

2. The petition and amended petition clearly show that plaintiff sued and intended to sue the conductor, engineer and fireman of the train who were the parties which inflicted the injuries complained of, on his intestate, and the failure, if there was any, to designate them by the proper name, was a mere misnomer, not reaching the merits of the case and not presenting a jurisdictional question, of which the parties themselves, but not the C. & O. Ry. Co. might have taken advantage of in a proper way. Civil Code, sec. 134; L. & N. R. R. Co. v. Hall, 12 Bush, 131; Heckman v. L. & N. R. R. Co., 85 Ky., 631; Smelt v. Knapp, 16 Neb., 54; Knoski v. Mo. Pac. R. Co., 77 Mo., 370; Whitcomb v. Hooper, 81 Fed. Rep., 948; vol. 14 Ency. of Pl. & Pr., p. 301; Kenyon v. Semon, 43 Minn., 180; Hoffman v. Dickerson, 31 W. Va., 142; Empire State Sav. Bank v. Beard, 81

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Hun, N. Y., 184; Winston's Admr. v. I. C. R. Co., 65 S. W., 7; C. & O. Ry. Co. v. Dixon's Admr., 179 U. S., 131.

3. The Chesapeake & Ohio Railway Company is in the fullest sense a domestic corporation. N. N. & M. V. Co. v. McDonald Brick Co.'s Assignee, 59 S. W., 334; Constitution of Ky., sec. 211; Com. v. M. & O. R. Co., 23 R., 788; Ark. Laws 1889, p. 43; St. L. & S. F. R. Co. v. James, 161 U. S. Rep., 565; Orient Ins. Co. v. Daggs, 172 U. S., 557; Hooper v. California, 155 U. S., 648; Stout v. R. R. Co., 8 Fed. Rep., 794; Louisville Trust Co. v. Louisville, &c., R. Co., 75 Fed. Rep., 433; 13 Am. & Eng. Ency. of Law (2d ed.), p. 84; Tullis v. Lake Erie, &c., R. Co., 175 U. S., 348; Ency. Pl. & Pr., vol. 22, p. 327 and cases cited.

4. Moreover, the appellee, besides entering its appearance in the lower court, has entered its appearance to the action in this court. Cleveland, C. & C. R. Co. v. Mara, 26 Ohio St., 165; Pond v. Vermont Valley R. Co., 12 Blatchf U. S., 280.

5. Appellant's intestate being on her own land, at or near a private crossing, was not a trespasser and appellee owed her the duty to keep a lookout for her at or near said crossing. L. & N. R. Co. v. Bodine's Admr., 59 S. W., 740; Gulf R. Co. v. Rowland, 70 Tex., 298; Am. & Eng. R. R. Cases, p. 287 (vol. 35); Brigham v. Smith, 4 Gray, 297.

6. The pleadings in this case show that there has been, in effect, a consolidation of the Virginia, West Virginia and Kentucky corporations, and when a consolidated company is formed by the union of several corporations chartered by different States it is a citizen of each of the States which granted the charter to one of its constituent companies, and when sued in one of these States it can not claim the right of removal on the ground that it is also a citizen of another State.

For the purpose of jurisdiction in the Federal courts, and securing to the States the exercise of their just powers over corporations of their own creation, and over property within their jurisdiction, the consolidated company is conclusively presumed to be a citizen of each of the States whose laws and corporations contributed to its formation. It enjoys in each State all the powers and privileges the corporation there chartered had, and must answer in the courts and is amenable to the laws of each State respectively as a corporation of that State. Chicago & N. W. R. Co. v. Whitton, 13 Wall (U. S.), 270; Muller v. Dows, 94 U. S., 444; Farnum v. Blackstone Canal Co., 1 Sumn (U. S.), 46; St. Louis, A. & T. H. Co. v. Indianapolis & St. L. R. Co., 9 Bliss (U. S.), 144; same case under title of Pennsylvania R. Co. v. St. Louis, A. & T. R. Co., 118 U. S., 290, 24 Am. & Eng. R. Cas., 58; Racine & M. R. Co. v. Farmers'

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L. & T. Co., 49 Ill., 331; Quincy R. Co. v. Adams Co., 88 Ill., 615; Chicago & N. W. R. Co. v. Auditor General, 53 Mich., 91; Horne v. Boston & M. R. Co., 62 N. H., 454; Paul v. Baltimore, &c., R. Co., 44 Fed. Rep., 513; Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S., 356, 382, 42 Am. & Eng. R. Cas., 688; Pacific R. Co. v. Missouri Pac. R. Co., 23 Fed. Rep., 565; 20 Am. & Eng. R. Cas., 590; Guinault v. Louisville & N. R. Co. 41 La. Ann., 571, 40 Am. & Eng. R. Cas., 340; Central Trust Co. v. St. Louis A. & T. R. Co., 41 Fed. Rep., 551, 42 Am. & Eng. R. Cas., 26.

E. L. WORTHINGTON AND W. H. WADSWORTH, FOR APPELLEE, C. & O. RY. CO.

POINTS AND AUTHORITIES.

1. When a proper petition for removal and bond is presented to the State court it is its duty to order the removal, and it has no power to permit an amendment to plaintiff's petition to be filed thereafter. 2 Foster's Federal Practice, sec. 385c; Moon on Removal of Causes, sec. 178.

2. The fact that a defendant enters his appearance in the State court by demurrer or motion does not take away his right to remove the cause to the Federal court, provided he files a proper petition for removal and bond on or before the day he is required to make defense to the action. Moon on Removal of Causes, sec. 155; 2 Foster's Federal Practice, sec. 385d; Act of Congress of 1887-8, sec. 1.

3. A railroad company is not under any duty to slacken the speed of its trains, or to give signals at private crossings. Johnson v. L. & N. R. Co., 91 Ky., 651; L. & N. R. Co. v. Survant, 96 Ky., 197; Cahill v. Cincinnati R. Co., 92 Ky., 345; L. & N. R. Co. v. Survant, 19 Ky. Law Rep., 1576; Shackleford v. L. & N. R. Co., 84 Ky., 45.

4. The allegations of a petition for removal on account of fraudulent joinder of sham defendants for the purpose of preventing a removal, must be accepted as true in the State court. Issue can be made on the truth of those allegations only in the Federal court. Durkee v. Illinois Central R. Co., 81 Fed. Rep., 1; McCormick v. Illinois Cent. R. Co., 100 Fed. Rep., 250; 2 Foster's Federal Practice, sec. 385c; Moon on Removal of Causes, secs. 131, 177 and 201.

5. If a plaintiff has no cause of action against parties made defendants for the purpose of preventing a removal and had no good reason to believe that he had any cause of action against them, then it is a fraudulent joinder such as will not affect the real defendant's right to a removal. Moon on Removal of

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Causes, sec. 131; Hukill v. Maysville, &c., R. Co., 72 Fed. Rep., 745.

6. A compliance by a foreign corporation with the requirements of section 841, Kentucky Statutes, does not make it a Kentucky corporation in the sense of the Federal Constitution and acts of Congress conferring jurisdiction on the courts of the United States by reason of diverse citizenship. Taylor's Admr. v. Ill. Cent. R. Co., 89 Fed. Rep., 119; St. Louis, &c., R. Co. v. James, 161 U. S., 545; Louisville R. Co. v. Louisville Trust Co., 174 U. S., 552.

E. L. WORTHINGTON AND W. H. WADSWORTH, FOR APPELLEE ON PETITION FOR REHEARING.

POINTS AND AUTHORITIES.

1. A corporation, considered as a legal entity, is not a citizen of a State within the meaning of article 3, section 2, of the Constitution of the United States. Bank v. Deveaux, 5 Cranch, 86; Covington Drawbridge Company v. Shepherd, 20 How., 227; Muller v. Dows, 94 U. S., 444.

2. The statement that a corporation is a legal entity distinct from its stockholders is a mere fiction. A corporation is really and actually composed of individuals who are citizens. 1 Morawetz on Corporations, secs. 1 and 227; Taylor on Private Corporations, sec. 51; Clark and Marshall on Corporations, pp. 2, 17 and 18; State v. Standard Oil Co., 49 Ohio St., 137; People v. North River Sugar Refining Co., 121 N. Y., 582; Pembino Mining Co. v. Pennsylvania, 125 U. S., 181; U. S. v. Trinidad Coal Co., 137 U. S., 161; Baltimore, &c., R. Co. v. Fifth Baptist Church, 108 U. S., 330; Kansas Pac. R. Co. v. Atchison, &c., R. Co., 112 U. S., 414.

3. In order to give the Federal courts jurisdiction of actions by or against a corporation it was held, at first, that it was necessary to aver that all the stockholders of the corporation were citizens of a State different from the opposite party to the suit. Bank v. Deveaux, 5 Cranch, 86; Bank v. Slocumb, 14 Peters, 60.

4. Subsequently the Supreme Court held that in a suit by or against a corporation there was a conclusive presumption that the stockholders of the corporation were all citizens of the State creating the corporation. Louisville R. Co. v. Letson, 2 How., 497; Marshall v. Baltimore & Ohio R. Co., 16 How., 327.

5. When one State incorporates a corporation of another State, there is no presumption that the stockholders of this new corporation thus created are citizens of the State creating it, but the presumption remains that they are citizens of the State *first* creating the corporation. St. Louis Ry. Co. v. James, 161

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U. S., 545; Louisville R. Co. v. Louisville Trust Co., 174 U. S., 552; Walters v. Chicago R. Co., 186 U. S., 479; Calvert v. Southern Ry. Co., decided by U. S. Supreme Court Nov. 3, 1902; Louisville Trust Co. v. Louisville R. Co., 75 Fed. Rep., 433; Walters v. Chicago R. Co., 104 Fed. Rep., 377; Calvert v. Southern Ry. Co., 64 S. C., 143; 41 S. E. Rep., 963.

6. Section 841, Kentucky Statutes, does not create a new corporation, but simply domesticates a foreign corporation already created.

ON REHEARING—REHEARING GRANTED AND FORMER OPINION WITHDRAWN. OPINION OF THE COURT BY JUDGE PAYNTER—AFFIRMING.

This is an action to recover damages for the loss of the life of the intestate by the alleged negligence of the Chesapeake & Ohio Railway Company. It presented its petition and asked for the removal of the case to the federal court, and the motion was sustained. Owing to our duplex system of government, perplexing and delicate questions as to the respective jurisdiction of the federal and State courts arise; and the judiciary should meet and dispose of them with fairness and in the orderly manner which should characterize the proceedings of courts of justice. It will not be our purpose to discuss the questions considered by the Supreme Court of the United States, but to state its conclusions and follow them, as that court has jurisdiction to adjudicate the questions involved.

Section 1, art. 3, of the Constitution of the United States provides that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." Section 2 of the same article provides that "the judicial power shall extend to all cases in law and equity, arising under this Constitution, . . . to controversies . . . between citizens of different States." When a case decided by a supreme court of a State involves the question of diverse citizenship the Supreme Court of the United

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States has held in many cases that it will review the judgments of those courts on the question. That court having adjudged the precise question here involved, and adversely to the view of this court, expressed in the former opinion delivered herein, we feel that the petition for a rehearing should be granted, and the opinion withdrawn, which is done.

he appellant is a citizen of Kentucky. It is substantially averred in the petition that the Chesapeake & Ohio Railway Company is a corporation organized under the laws of Virginia, and became a corporation, citizen, and resident of this State by filing in the office of the Secretary of State and in the office of the Railroad Commission, pursuant to section 211 of the Constitution and section 841 of Kentucky Statutes of 1899 copies of its articles of incorporation. The Chesapeake & Ohio Railway Company is a Virginia corporation. It complied with section 841 Ky. St. 1899, which reads as follows: "No company, association or corporation created by, or organized under, the laws or authority of any State or country other than this State, shall possess, control, maintain or operate any railway, or part thereof, in this State until, by incorporation under the laws of this State the same shall have become a corporation, citizen and resident of this State. Any such company, association or corporation may, for the purpose of possessing, controlling, maintaining or operating a railway or part thereof in this State, become a corporation, citizen and resident of this State by being incorporated in the manner following, namely: By filing in the office of the Secretary of State, and in the office of the Railroad Commission, a copy of the charter or articles of incorporation of such company, association or corporation, authenticated by its seal and by the attesta-

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tion of its president and secretary, and thereupon, and by virtue thereof, such company, association or corporation shall at once become and be a corporation, citizen and resident of this State. The Secretary of State shall issue to such corporation a certificate of such incorporation," This section of the statute was based upon section 211 of the Constitution of the State, which reads as follows: "No railroad corporation organized under the laws of any other State, or of the United States, and doing business, or proposing to do business, in this State, shall be entitled to the benefit of the right of eminent domain or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this Commonwealth." When the Chesapeake & Ohio Railway Company complied with the terms of this section of the statute, it at once became "a corporation, citizen and resident of this State," for it is therein so provided.

But the question then arises whether it remained a citizen of the State where it was organized in the meaning of section 2, art. 3, of the Constitution of the United States. In Bank v. Deveaux, 5 Cranch, 86, 3 L. Ed., 38, Chief Justice Marshall said: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen, and consequently can not sue or be sued in the courts of the United States, unless the rights of members in this respect can be exercised in their corporate capacity." In Covington Drawbridge Co. v. Shepherd, 20 How., 227, 15 L. Ed., 896, it was said: "No one, we presume, ever supposed that the artificial being, created by an act of incorporation, could be a citizen of a State in the sense in which that word is used in the Constitution of the United States." In Muller v. Dows, 94

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U. S., 444, 24 L. Ed., 207, the court said: "A corporation itself can be a citizen of no State, in the sense in which the word 'citizen' is used in the Constitution of the United States. A suit may be brought in the federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation; and for the pupose of jurisdiction it is conclusively presumed that all the stockholders are citizens of the State which by its laws created the corporation." At first the Supreme Court held that, in order to give federal courts jurisdiction of an action by or against corporations, it was necessary to aver citizenship of the incorporators. Subsequently it held that the individuals composing a corporation were conclusively presumed to be citizens of the State creating the corporation.

There is no averment in the petition that the individuals composing the Chesapeake & Ohio Railway Company were associated together for the purpose of organizing a corporation of the same name in this State. The corporation which they organized in another State is, by an act of the General Assembly, declared to be a citizen and corporation of Kentucky, by reason of its compliance with certain constitutional and statutory regulations. In St. Louis R. Co. v. James, 161 U. S., 545, 16 Sup. Ct., 621, 40 L. Ed., 802, it appeared that the St. Louis Railroad Company had been incorporated by the State of Missouri, and had subsequently filed its articles of incorporation with the Secretary of State of the State of Arkansas, under a statute like the one under consideration. A citizen of Missouri sued it in Arkansas, alleging it was a citizen of Arkansas. The court held that it was not a citizen of Arkansas, and was entitled to have its case removed to the federal court. The precise question involved in this case was decided in

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Walters v. Chicago R. Co., 186 U. S., 479, 22 Sup. Ct., 941, 47 L. Ed., —, the court holding that the case should be removed to the federal court; and as authority for the decision cited St. Louis R. Co. v. James, and Louisville R. Co. v. Louisville Trust Co., 174 U. S., 552, 19 Sup. Ct., 817, 43 L. Ed., 1081. On November 3, 1902, the same court, in Calvert, Administrator, v. Southern Railway Co., 23 Sup. Ct., —, 47 L. Ed., —, decided the same question here involved and in the Walters case, and ruled the same way it did in the latter case. Southern Railway Company v. Allison, 23 Sup. Ct., 713, 47 L. Ed., —, decided May 18, 1903, by the Supreme Court, involved precisely the same question we have under consideration. The Southern Railway Company, a Virginia corporation, accepted the provisions of the statute of North Carolina, which is similar to our statute. The question was whether it was by virtue thereof a citizen of North Carolina, and thereby lost its citizenship of Virginia, in the meaning of the federal Constitution; and the court held that it had not, and that it was entitled to have the action removed to the federal court. In that case the court reviewed the cases to which attention has been called, and held them to be authority for its conclusion. The court also said it had "read with respectful consideration" the case of Debnam v. Southern Bell Telephone Co., 126 N. C., 831, 36 S. E., 269, in which the Supreme Court of that State reached the same conclusion that this court reached in the opinion which has been withdrawn, but it said it could not concur therewith. The Debnam case was cited in the withdrawn opinion as authority therefor.

After the petition for removal had been filed, the appellant tendered an amended petition, making the Maysville & Big Sandy Railroad Company, a domestic corporation and appellee's lessor, a defendant. It came too late to prevent

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a removal of the case. Therefore it was not within the rule of the McCabe case (112 Ky., 861, 23 R., 2328), 66 S. W., 1054, and Person v. Illinois Central Railroad Co. (C. C.), 118 Fed., 342.

Before the petition for removal was filed, the plaintiff filed an amended petition, making Bracken, Lewis, and Inskip defendants, who were the conductor, engineer and fireman, respectively, and who are alleged to have been in charge of the train when the accident happened. A recovery is sought against them, as well as the Chesapeake & Ohio Railway Company.

It is alleged that the intestate was run over and killed "at or near" a private crossing over the railroad track between her house and garden; that it was "not far" from public crossings to the east and west of her. The alleged negligent acts are that the train ran over the crossing at the rate of 50 miles per hour, which was a dangerous speed; that they failed to keep a lookout for travelers upon or at the crossing; that they failed to give signals of the approach of the train to the crossing. These are the acts of negligence averred in the petition. The averment that she was killed "at or near" the private crossing should be construed that she was killed at a place on the track other than the crossing, because pleadings are to be construed most strongly against the pleader. A failure to slacken the speed of the train, or to give signals at the approach to private crossings, is not negligence. Louisville & Nashville R. R. Co. v. Survant (19 R., 1576), 44 S. W., 88; Johnson's Adm'r v. Louisville & Nashville R. R. Co., 91 Ky., 651, 10 R., 227, 25 S. W., 754. It is only where the crossing is a public one that reckless speed or the failure to give signals amounts to negligence of the railroad company. Louisville & Nashville R. R. Co. v. Survant, 96 Ky.,

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197, 16 R., 545, 27 S. W., 999. In Louisville & Nashville R. R. Co. v. Bodine (23 R., 147), 59 S. W., 742, 56 L. R. A., 506, it appeared that the party had been injured at a private crossing, and in considering the question of negligence, the court said: "In this case, in view of the dangerous character of the crossing, its long use, not only by Bodine, but by the public, the fact that signals were accustomed to be given by the trains as they approached it, the speed of this train, and the fact that it was a special, imposed upon the appellant the obligation to give such warning of its approach to this crossing as exigencies of the situation demanded for the protection of human life; and, as no warning at all was given, we think the jury were warranted in concluding that proper precaution was not exercised by appellant, and that by reason of this the accident occurred."

The rule there stated does not change the general rule announced in Johnson's Adm'r v. Louisville & Nashville R. R. Co., but simply recognizes an exception to it. The facts averred do not bring the case within the rule of Louisville & Nashville R. R. Co. v. Bodine. Neither do they bring it within the rule of the Cahill case, 92 Ky., 345, 13 R., 714, 18 S. W., 2, if for no other reason than there is no averment that the signals usually given on the approach of trains to the public crossings referred to could have been heard at the private crossing, the distance between the public and private crossings not being given, so the court could infer that a signal given at the public crossing could have been heard at the private crossing. The averment that the public crossings were near the private one is not sufficient because what in the estimate of the pleader was near might be too far for the signal to be heard at the private crossing.

From the averments the court concludes that the intes-

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tate had the right to use the private crossing. But, under the rule that a pleading must be construed most strongly against the pleader, the averment that she was killed "at or near" the crossing is equivalent to the averment that she was not killed on it, but near the crossing; hence she was a trespasser. This being true, under the well-settled rule of this court, those in charge of the train owed her no duty, except to use reasonable care to save her after discovering her peril. As she was not on a crossing when killed, it can not be claimed that, as to the intestate, it was negligence to fail to give signals on the approach to either the private or public crossing. In Shackleford's Adm'r v. Louisville & Nashville R. R. Co., 84 Ky., 43, 7 R., 729, the court said: "Railroad trains must give the customary signals at public places or public crossings. The failure to do so is negligence; but this is required for the safety of passengers, trainmen and the public using, and who have the right to use, the track at such public ways, and not for the purpose of protecting those who, as trespassers, may be crossing or using the track elsewhere. The instances are numberless upon every railroad of persons living along it, and having to and being in the habit of crossing the track to pass from the dwelling to the outbuildings, or vice versa; and to require the companies in all such cases to signal the approach of their trains, and to presume and guard against the presence of persons upon the track, would not only be unreasonable, but detrimental to public travel."

If the plaintiff desires to join as defendants persons who are claimed to be jointly liable for the tort with the railroad company, which is a foreign corporation, and thus prevent a removal of the case to the federal court, a cause of action must be stated against the parties so joined. Our

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conclusion is that the amended petition did not state a cause of action against Bracken, Lewis, and Inskip.

The judgment is affirmed.

Judge Nunn dissents from so much of the opinion as recognizes that a foreign corporation is entitled to have its case removed to the federal court, after complying with section 841 of the Kentucky Statutes of 1899.

Whole court sitting.

Petition for rehearing by appellant overruled.

For former opinion, see 24 R., 1125, 70 S. W., 857.

CASE 13—ACTION BY C. B. LOWELY AGAINST THE CITY OF LEXINGTON TO TEST THE VALIDITY OF AN ORDINANCE OF SAID CITY.—JUNE 18.

Lowery v. City of Lexington.

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APPEAL FROM FAYETTE CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

MUNICIPAL CORPORATIONS—DELEGATED POWERS—AGENTS—OFFICES CREATED BY ORDINANCE.

Held: 1. Under the Constitution and its charter, the city of Lexington has no power to create any office or officers other than those provided for therein.

2. An ordinance of a city providing for the construction of a sewer system, and appointing certain persons to superintend its construction, employ a sanitary engineer, advertise for and receive bids, fixing such restrictions and limitations as they might determine, not being required to report to the council any bids which, in their judgment, the city should not accept, was an invalid delegation of powers delegated to the council by Kentucky Statutes, 1899, section 3058, giving to the city council of that city the power and authority, by ordinance, to establish, erect, and maintain sewers.

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BRECKINRIDGE & SHELBY, ATTORNEYS FOR APPELLANT.

In the charter of cities of the second class is the following section, to-wit, section 3105:

"The general council shall have power to construct sewers along or under any of the streets, alleys or highways of the city, and may assess the entire cost, including intersections, of constructing the same to an amount not exceeding one dollar per front foot of the abutting property upon the lots and lands bounding or abutting upon said streets, alleys or highways in, under or along which the sewers shall have been constructed; the cost of the construction of sewers, not exceeding said sum of one dollar per front foot of the abutting property, shall be apportioned equally on the said abutting lot owners according to the front feet. When the amount of the quotient, after dividing the entire cost of the construction of the sewer, as estimated and computed to the general council by the engineer by number of front or abutting feet, exceeds the sum of one dollar per front or abutting foot, then, and in that event, the entire cost of construction of said sewer shall be assessed upon the lots and lands in the neighborhood of said sewer which may be benefited thereby according to the benefits received; and in every such case the council shall, by ordinance, fix and determine the amount of tax to be levied upon the several lots or lands so benefited. The general council may, however, out of the general fund, contribute and pay towards the construction of such sewer such part thereof as may to the council seem proper. The tax provided for in this section shall be a lien upon such abutting or benefited property, as the case may be, and may be collected and enforced as street improvement liens are collected and enforced; but the amount of sewer tax assessed against any lot or land shall in no event exceed one dollar per front or abutting foot."

The general council of the city of Lexington adopted ordinance No. 1372, which is copied in the record, "to provide for the construction of a system of sewers in the city of Lexington, and to order an election to determine the question of issuing $150,000 of bonds of the city of Lexington.

As we understand there were two questions upon which the circuit court doubted, and upon consideration decided them against the validity of the ordinance.

1. That the ordinance creates in section 7 an office or offices, and that the persons therein named are in law officers. This we respectfully deny. That section is as follows, to-wit:

"George S. Shanklin, L. G. Cox, R. P. Stoll, J. R. Barr, Judge Mat Walton and Gus Straus are hereby employed by the city of Lexington to superintend and supervise the construction of

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the sanitary sewer system of said city, as provided for in this ordinance. And the general council is hereby authorized to pay to said named persons a sum not to exceed $300 each."

We respectfully contend (1) that no office is created by this ordinance; that the persons named in section 7 are merely employes and servants, who at any time, may be discharged by the city, or who may at any time decline further employment. (2) that under the powers granted to the city council it has the power to adopt and construct a system of sewers, and to contribute and pay towards the construction thereof such sum as may be necessary, or as the council may determine is necessary, out of a fund to be raised by the issuance and sale of bonds. (3) But before it can issue or sell these bonds it must obtain authority by an election duly held, at which election such authority is legally granted.

This is a matter of immeasurable importance to the city of Lexington. A system of sewers is an absolute necessity to the health and growth of the city. For years the council has been unable to agree upon what action it would take. Finally, it has agreed upon this ordinance. The vast majority of the people of Lexington in our judgment desired its passage. It is of the utmost importance that if it has the power this court will say so that it may exercise it. If it has not the power to do this that the court say so, indicating what is the defect, what is the omission in the powers granted, so that the Legislature may be appealed to to remedy the defect and supply that omission.

W. S. BRONSTON, CITY SOLICITOR, FOR CITY OF LEXINGTON.

We contend that ordinance No. 1372 is illegal and void:

First, Because it seeks to establish new offices, and we might lengthen this argument indefinitely were we not unwilling to impose upon the patience of this honorable court by showing not only does it seek to create new offices, but attempts to have officers appointed with an indefinite term, which is directly contrary to the Constitution.

Second, It seeks to delegate legislative power belonging exclusively to the general council, which can be exercised by no other body or agent.

Third, It seeks to impose a general taxation for the construction of sewers, when the law clearly provides that such a public work shall be paid for by the abutting property owners.

For these various reasons, we ask that the judgment of the lower court be affirmed.

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AUTHORITIES CITED.

Lowery v. City of Lexington, 24 R., 516; Ky. Stats., secs. 3094, 3105, 3118, 3144; Cooley on Con. Lim., 6th ed., p. 248; Dillon on Mun. Corp., vol. 1 (3d ed.), sec. 96, vol. 2, sec. 779; Murray, &c., v. Tucker, &c., 10 Bush, 240; Byrne v. City of Covington, 15 R., 33.

OPINION OF THE COURT BY JUDGE NUNN—AFFIRMING.

This action was instituted by C. B. Lowery, appellant, to test the validity of Ordinance No. 1372, passed by the city council of Lexington, Ky. The ordinance was to authorize and provide for the construction of a system of sewers in the city of Lexington, and to order an election to determine the question of issuing $150,000 of bonds of the city for that purpose. The city demurred to the petition of appellant, the court sustained the demurrer, and adjudged that the ordinance was invalid and void. To test that question is the object of this appeal.

The first section of the ordinance authorizes sewers to be constructed in accordance with plans drawn by Col. George E. Waring, with such changes, alterations, extensions, and additions as might be determined upon in the mode and manner hereinafter set out and provided. The second section provided the manner of issuing the bonds, and the terms thereof. The other sections, down to the seventh, provided the manner of holding the election and determining the result thereof. The seventh section is as follows: "George S. Shanklin, L. G. Cox, R. P. Stoll, J. R. Barr, Judge Matt Walton and Gus Straus are hereby employed by the city of Lexington to superintend and supervise the construction of the sanitary sewer system of said city as provided for in this ordinance. And the general council is hereby authorized to pay to said named persons as wages a sum not to exceed $300.00 each." Section 8 authorizes the employment of a capable, competent sani-

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tary engineer, who was authorized, under the superintendence of the persons named in section 7, to superintend all work, examine all materials, contracts, and purchases made under this ordinance, and, under the direction of the persons named, to superintend the construction of the sewer, disposal field, tanks, buildings, machinery, or appliances to be constructed under the ordinance. Section 9 authorized the persons named in section 7 to advertise for bids for the construction of the system, and to fix such restrictions and limitations therein as they might determine, and receive the bids, and to open and compare same, and to report to the general council the names of the lowest and best bidders, and to prepare all necessary contracts, specifications, and plans. If, in the judgment of the persons named in section 7, the bids received by them were too high, or for any reason were not such bids as the city should accept, they were authorized to reject all bids and advertise for new bids, without reporting to the general council their action. Section 9 closes as follows: "It being distinctly understood and provided in this ordinance that said persons are not required to report to the general council any bids which, in the judgment of said persons, the general council ought not to accept, or any contracts which the said persons do not believe the city ought to enter into." Section 10 provided that no money should be paid to any contractor under any contract entered into by virtue of this ordinance until the work had been examined and approved by the engineer employed under this ordinance, and a certificate issued to such contractor by the engineer, and the same was approved by the persons named in section 7, and when the certificate was thus issued and approved the same should become binding upon the city, and should be paid out of the proceeds of the sale of the bonds.

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Section 11 of the ordinance closes as follows: "If any part of this ordinance is declared illegal by any court of competent jurisdiction, then no bonds are to be issued under this ordinance, and this ordinance is to be considered as invalid and void."

Appellee's counsel contends that the ordinance is void because it creates new offices and officers, and names the persons to fill them, which he claims is in violation of the Constitution and the city charter. Appellant's counsel, on the other hand, contend that the ordinance does not create any office or officer, and that the persons named in the ordinance were not appointed as officers, but only as agents of the city to superintend the construction of the sewerage system provided for therein. We are of the opinion that the ordinance is void in either event. If they are to be regarded as officers, then it is void because the city had no power, under the Constitution and charter, to create any office or officers other than those provided for therein. See the case of Lowery v. City of Lexington, 113 Ky., 763, 24 R., 516, 68 S. W., 1109. If it was intended by the ordinance to make them simply agents, then it is void because they supplant the city council in the matters provided for in the ordinance. The General Assembly, by section 3058 of the Kentucky Statutes of 1899, delegated to the city council of the city of Lexington the power and authority, by ordinance, to establish, erect, and maintain sewers; and it had no power by ordinance to delegate this power to others, and relieve itself of responsibility. We do not mean to be understood to say that the city council should perform the manual labor, or be present in a body or individually to superintend the construction of the sewer; but it should retain the power and control, and remain supreme in the matter of the approval of the plans and specifications, ma-

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terial to be used, prices to be paid for same, the acceptance or rejection of bids for the work, and the approval or rejection of the work when completed, the issual of the bonds, the payment of the money on contracts, and other like duties and powers. The council had no right or power to delegate such duties and powers to others, and relieve itself from the labor and responsibility thereof. Dillon, in his work on Municipal Corporations, vol. 1 (3d Ed.), section 96, uses this language: "The principle is a plain one that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, can not be delegated to others." In the same work (volume 2, section 779), this language is found: "We have already had occasion to refer to the principle that public powers conferred upon a municipality, to be exercised by its council when and in such manner as it shall judge best, are incapable of delegation. The principle extends to the authority conferred upon a municipal corporation to levy and collect taxes, or to determine upon the necessity and character of local improvements." To the same effect is the case of Hydes v. Joyes, 4 Bush, 464, 96 Am. Dec., 311.

We are clearly of opinion that the ordinance is void. Wherefore the judgment of the lower court is affirmed.

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CASE 14—ACTION BY HENDERSON COUNTY AGAINST HENDERSON BRIDGE COMPANY TO RECOVER TAXES FOR 1893-4-5-6.—JUNE 19.

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Henderson County v. Henderson Bridge Co.

APPEAL FROM HENDERSON CIRCUIT COURT.

FROM A JUDGMENT DISMISSING THE ACTION PLAINTIFF APPEALS. REVERSED.

JUDGMENT—ENJOINING COLLECTION OF TAX BY SHERIFF—CONCLUSIVE AGAINST COUNTY—SUBSEQUENT ACTION BY COUNTY.

Held: 1. Kentucky Statutes (1899), section 4129, makes the sheriff collector of all taxes, unless otherwise provided. Sections 4148, 4151, 4184, point out the mode of collection by levy on land, &c. Section 4131 provides that when the office of sheriff is vacant the county court may appoint a collector of taxes. Constitution, section 144, provides that each county shall have a fiscal court, and Kentucky Statutes (1899), section 1834, provides that the corporate powers of the county shall be exercised by the fiscal courts. Section 1840 gives the court control of the fiscal affairs of the county, and provides that it shall have jurisdiction of all matters relating to the levying of taxes, &c. HELD, that as, under the statutes, the sheriff of a county, so far as his powers affect taxation, is merely a tax collector, a default judgment against him in suit by a taxpayer to enjoin the collection of taxes, in which the county is not a party, is not binding on the county in a subsequent action by it to collect the taxes.

MONTGOMERY MERRITT, FOR APPELLANTS. N. POWELL TAYLOR, COUNTY ATTORNEY.

1. The right to tax the Henderson Bridge Company upon all its property, tangible and intangible, and the manner of assessing same, the right to collect the taxes by suit, and the sufficiency of the pleadings therefor, most if not all the issues raised by the pleadings in this case, have been settled by adjudications since this litigation began, in favor of appellant in Henderson Bridge Co. v. Negly, 63 S. W. Rep., 989; Louisville Bridge Co. v. City of Louisville, 65 S. W. Rep., 815; Campbell County v. N. & C. B. Co., 66 S. W. Rep., 526, except the plea of res adjudicata, and we now supplement our brief on that point. It is expressly held in one or two cases a fine could be maintained.

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2. The common practice in Kentucky is to make the city or county a party to a suit to enjoin the collection of taxes due them respectively.

Counsel for bridge company under paragraph V of their printed brief say: "It has been the common practice in this State to sue public officers engaged in the collection of taxes, claimed to be illegal for the purpose of enjoining them from making such collection. And such judgments have always been considered as binding on the political body represented by the officer." And they cite four cases to establish that common practice. Two of them practiced by Messrs. Helm & Bruce and one by Russell & Helm. It would be hardly fair to the remainder of the profession to hold them bound by the practice of attorneys in those cases, especially as the question of res adjudicata or defect of parties was not made in said cases, and for the further reason that the State virtually made itself a party by employing Messrs. Helm & Bruce to represent it and paid them, as the Auditor's report shows, for their services.

But let's examine that position taken by counsel, further, to see what foundation there is for it. The common practice in the State has been just the reverse, as shown by the following cases in which both the tax collector and the municipality or county were made parties. Paducah St. Railway Co. v. McCracken Co., &c., 43 S. W. Rep., 178; Royer Wheel Co. v. Taylor Co., &c., 47 S. W. Rep., 876; Eastern Ky. R. R. Co. v. Carter County, &c., 11 R., 677; Ryan v. Central City, &c., 54 S. W. Rep., 2; L. & N. R. R. Co. v. Warren County, 5 Bush, 243; Paducah Gas Light Co. v. McCracken County, &c., 105 Ky., 472; City of Henderson v. Lambert, 14 Bush, 24; City of Lexington v. McQuillan Heirs, 9 Dana, 514; Jackson v. Brown, &c., 66 S. W. Rep., 396; Town of Central Covington v. Park, 56 S. W. Rep., 650.

3. The county or fiscal court was a necessary party defendant to the injunction suits.

The ancient rule of practice as laid down by Daniel's Chancery Pleading and Practice, and which is referred to in 157 U. S. R., 691 L. Co. Ed., was to require all parties in interest, to be made parties to the suit, and if the defect of parties appeared upon the face of the petition, it was ground for demurrer. The Kentucky Code of Practice requiring all suits to be brought in the name of the real party in interest and other parties in interest to be made defendants, is but a reiteration of, and recognition of this ancient rule of practice. (Newman's Pleading and Practice, p. 210.)

The object was to have an end to litigation between all par-

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ties interested in the subject matter of litigation, as only parties and privies are bound by the judgment.

This court has more than once said only those are parties who are named as such. Allen Heirs v. Hall's Heirs, 1 Mar., 393; M. & St. P. Co. v. Grey, 9 Bush, 137.

Neither the county nor its fiscal court was a party to any of these suits brought by the bridge company against the sheriff alone, to enjoin the collection by him of the taxes due upon its tangible and intangible property.

The contention of the bridge company is that the sheriff was the legal representative of the county, and therefore the various judgments by default in question, bound the county. The county upon the other hand says that the fiscal court alone was its legal representative.

By the act of 1892 the fiscal court was created (Ky. Stat., p. 687). Section 1834 says: "Unless otherwise provided by law, the corporate powers of the several counties of this State shall be exercised by the fiscal courts thereof respectively." Section 1839 authorizes the fiscal court to levy taxes, and section 1840 "to regulate and control the fiscal affairs and property of the county."

The sheriff is simply a ministerial officer ex-officio, the collector of taxes, and is not authorized to represent the county in any litigation. It was not the sheriff's duty to litigate the question as to whether the fiscal court had made a levy, nor as to whether the bridge company was subject to taxation upon its tangible or intangible property, nor as to the manner of assessing same. There was no reason for not making the county or the fiscal court a party—the real party in interest.

We do not contend that when a temporary injunction only is sought that the sheriff or tax collector would not be the only party defendant necessary in many cases. But when the merits of the controversy, the subject-matter of the suit is to be litigated so that the final judgment of the court could be pleaded as res adjudicata, then the beneficiary of the tax, when collected—the city or county—must be made a party, unless they virtually make themselves a party by taking charge of the defense as was done in the case of Clark v. Louisville Waterworks, Barbour v. Board of Trade and L. C. & L. R. R. Co. v. Schmidt heretofore mentioned, where the State in the first two cases employed some of the present able counsel representing the Henderson Bridge Company and paid them for their services.

Suppose that the county had been made a party in the case at bar, upon whom would the summons have been served—the sheriff? No. Upon the county judge. Who would have taken

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charge of the defense for the county—the sheriff? No; the county judge and county attorney. The sheriff would have had no voice in the defense of the county. The only interest he would have had in the litigation was his commission on the amount of tax enjoined.

How, then, can a judgment against the sheriff alone bind the county or be pleaded as res adjudicata against the county when it was not his legal duty to defend the suit? If the county was a necessary party, then the judgment against the sheriff alone did not bind the county and can not be pleaded as res adjudicata in this case.

AUTHORITIES CITED.

3. The county or fiscal court was a necessary party defendant to the injunction suits. Ky. Stats, secs. 1834, 1839 and 1840; 10 E. P. & P., 913-4; Vass v. Union School District No. 11, 18 Kan., 467; Hays v. Hill, 17 Kan., 360; Gilmore v. Fox, 10 Kan., 509; Heinroth v. Kachersperger, 173 Ill., 212; Lefferts v. Board of Supervision, 21 Wis., 688; 40 Conn., 312; Bradley v. Gilbert, 155 Ill., 154, 39 N. E. Rep., 593; Knoff v. C. R. E. Board, 50, 50 N. E. Rep., 659; Ashton v. City of Rochester, 28 A. S. R., 623; People v. Clark, 70 N. Y., 578; Knoff v. 1st Nat. Bank of Chicago, 173 Ill., 331, also 212; Sauls v. Freeman, 24 Fla., 209, 12 A. S. R., 197; Peck v. State, 137 N. Y., 372, 33 A. S. R., 739; Harmon v. Auditor, 123 Ill., 5 A. S. R., 502; Gallaher v. City of Moundsville, 34 W. Va., 26 A. S. R., 946; State v. Chester R. R. Co., 13 S. C., 280; Foust v. City of Huntington, 113 Ind., 139, 15 N. E. R., 337; Harns' Parties to Action, secs. 18 and 28; Van Fleet Former Adjudications, secs. 568-9; Beech on Injunctions, sec. 399; Black on Judgments, sec. 584; Daniel Chancery Pleading and Practice, 4 Am. Ed., 190; L. Co. Ed., 157 U. S., 691; Roberts v. Davidson, 83 Ky., 282.

4. The State made herself a party by assuming defense and employing and paying counsel in Barbour, Sheriff, v. Board of Trade, 82 Ky., 645; Louisville Water Co. v. Hamilton, Sheriff, 81 Ky., 517; Clark, Sheriff, v. Louisville Water Co., 90 Ky., 515.

HELM, BRUCE & HELM, ATTORNEYS FOR APPELLEE. (YEAMAN & YEAMAN, OF COUNSEL.)

On the late oral argument of this case the positions taken and authorities cited by counsel for appellant were so totally different in many respects from those presented by his brief on the original submission of this case that it practically requires a re-writing of our brief.

At different times the Henderson Bridge Company brought

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several suits against the sheriff of Henderson county to enjoin him from collecting certain alleged county taxes which he was about to proceed to collect. Some of these actions were merely to enjoin the collection of a *part* of the tax claimed against the *tangible property* of the bridge company, the other part having been paid; while others of the actions were to enjoin the collection of any part of the tax claimed by the county against the *franchise* of the bridge company. Final judgments were entered in all of these actions granting the injunction sought.

On June 30, 1898, a suit in equity was filed in the Henderson Circuit Court of the following style: "The Commonwealth of Kentucky, which sues for the use and benefit of the county of Henderson, and her treasurer, S. C. Soaper, and who sue in the name of the Commonwealth of Kentucky, plaintiffs, v. The Henderson Bridge Company, defendant." In this suit "the plaintiffs above named in the caption" alleged that the Henderson Bridge Company had for several years, naming them, been assessed *on its franchise* by the State Board of Valuation and Assessment at various sums, naming them; that payment had been demanded of the county taxes based on these assessments, which payments had been refused; and the plaintiffs further alleged that for several years the county assessor had assessed the *tangible* property at $1,000,000, but that the company had paid the county taxes based on an assessment of its tangible property at only $649,735.54, and had refused to pay any more. Therefore, the plaintiffs prayed judgment for the several amounts of franchise taxes specified in the petition, and for that portion of the alleged taxes on tangible property which they claimed the defendant had not paid. Interest and penalties were also prayed for.

To this petition the Henderson Bridge Company first demurred, insisting that there was no statutory authority to sue for the taxes in question. This demurrer having been overruled, the bridge company then answered, pleading among other defenses *res adjudicata*, based on the judgments heretofore mentioned; and referring to the records in those several actions as parts of the answer.

The circuit court entered a final judgment sustaining the plea of *res adjudicata* and dismissing the petition.

On the original submission in this court counsel for appellant insisted that the appeal was not only from the judgment dismissing the petition in which the county had sued for the taxes, but that an appeal had also been taken by the county from the various judgments in the original actions in which the

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perpetual injunctions had been granted against the sheriff. And the brief on the original submission argued those cases on their merits.

But at the oral argument lately had, counsel for the appellant abandoned the claim of an appeal from the original judgments of injunction, and insisted only on the appeal from the judgment dismissing the county's petition in the action in which it sued for taxes.

There are involved in the case, under the position taken by counsel for appellant at the late argument, but two questions, to-wit:

1. Is there any authority for the maintenance of this suit by the county of Henderson for county taxes claimed to be due from the Henderson Bridge Company?

2. Is the plea of *res adjudicata* good?

We will discuss these two questions in their order.

1. No Right to Sue. There is probably no State in the Union in which the rule has been more rigidly enforced than in Kentucky, to the effect that a suit can not be maintained to recover a judgment for taxes except under express legislative authority. We ask the court's indulgence while we briefly state the exact status of the decisions of this court on this question.

In Baldwin v. Hewitt, 88 Ky., 673, this doctrine was announced and rigidly enforced. In that case the State was claiming a large amount of taxes. This court in effect held that these taxes were due. But notwithstanding this ruling it further held that there was no authority to sue for them, and therefore the petition had to be dismissed. On this subject the court said:

"There is no statute in this State, save as to railroad companies, authorizing a suit against the taxpayer for his taxes.

"The exercise of the power of taxation is legislative, and not judicial in character. Neither the levy nor collection of taxes is an inherent power of the judiciary. *It has ordinarily no more power to collect them than it has to levy them. These are not judicial acts.* . . . Taxes can, therefore, be collected only through legislative authority. If it does not exist, the remedy is an appeal to the law-making power for additional legislation. . . .

"It is true that although the collection of taxes is a ministerial act, yet the Legislature may empower, and even require, the judiciary to do in a judicial way what ordinarily belongs to the executive branch of the government. The remedy by suit may be given by statute. This, however, has not been done. . .

"The Legislature has expressly provided that a railroad corporation may be sued for its taxes. (General Statutes, sec. 5,

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art. 3, chap. 92.) This grant of power was given to avoid the evils which would result to the public from a distraint of the property; and the enactment implies the existence of a legislative opinion that in its absence no such suit could be maintained."

The case just mentioned involved the attempt to collect taxes on the property of an individual. At the time it was decided there was pending in this court under submission the case of the Louisville Water Company v. The Commonwealth, on appeal from a judgment of the Louisville Law and Equity Court, in a case wherein the sheriff of Jefferson county and the Commonwealth of Kentucky had sued the Louisville Water Company, a quasi public corporation, seeking to enforce the collection of a large amount of taxes. We had the honor to represent the Commonwealth in that case. And when the case of Baldwin v. Hewitt was decided we feared the principle of that decision might be applied in our case, though we thought the two cases were distinguishable; and we thereupon prepared and printed an elaborate brief upon the question of the power to collect taxes by suit, and filed the same in this court as a supplemental brief. The question was not raised on the other side in our case, and was not briefed by the counsel for the water company. This court, however, adhered to its decision in the Baldwin case and applied the principle thereof to the water company, and therefore reversed the judgment of the lower court and directed the petition to be dismissed. (Louisville Water Company v. Commonwealth, 89 Ky., 244.)

An examination of the points and authorities of counsel, beginning with paragraph five of the points for appellee, in the official report of this case, and also of the opinion of the court will show how thoroughly the matter was presented by brief and considered by the court. The opinion was devoted solely to this one question of the power to sue.

We called the court's attention to the fact that we did not seek, and had not obtained, a personal judgment, for the taxes against the water company, but that we had sought and obtained only a judgment *in rem*, appointing a receiver for the property of the water company with directions to pay the taxes out of the income of the company. And we called attention further to the fact that the Louisville Water Company was a quasi public corporation; that this court had held in the case of Louisville Water Company v. Hamilton, 81 Ky., 522, that it was such a corporation that it furnished water to the inhabitants of a great city, and that its property, therefore, could not be seized and sold by the sheriff for taxes. This being true, we called atten-

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tion to the fact that unless such a suit as we had brought could be maintained, there was absolutely no means of collecting the taxes which the water company owed. We further called attention to the fact that the statute gave an express lien for the taxes, and that as this lien could not be enforced by sale it was an appropriate case for a court of equity to give a remedy of the character sought, to-wit: By the appointment of a receiver. In our printed brief we stated the question to the court in the following language:

"This then is the case now presented: The Legislature has imposed a moneyed obligation or liability upon the corporation. We care not whether this be called a debt or a duty, it is an obligation or liability to pay money. This court has pointedly called attention to this fact (Greer v. Covington, 83 Ky., 414), and the statute frequently uses such expression as persons being 'liable' for the tax, or 'bound for' the tax, and of the tax as a 'liability.' (General Statutes, 1883 edition, chap. 92, art. 1, sec. 7; art. 9, secs. 3 and 7, &c.) Then, having created this obligation or liability to pay money, the statute in express terms gives a *lien* on the property of the person liable, to secure the payment of the money thus due. But here it stops (as to the character of property now being considered). It provides no mode of procedure at all for the enforcement of this lien expressly given to secure an obligation expressly created. The question then is, can a court of equity enforce such a lien by proceedings adapted to the nature of the property?" (See our printed brief in that case, page 3.)

Following this statement of the question we made an elaborate discussion of the authorities bearing upon it, showing, as we thought, that a court of equity did have power in such a case to afford a remedy. But in response to this argument and these authorities this court said:

"We are aware that it has been held by some courts and said by some text-writers, that if no specific remedy be given by statute, or only an imperfect or an inadequate one, then it is but reasonable to infer that a remedy by suit was intended by the Legislature. *This court has, however, never assented to such a rule. Public policy, in our opinion, forbids it.*" (Page 251.)

Again, we called the court's attention to the fact that in such cases as Railroad Company v. Trustees of Elizabethtown, 12 Bush, 233, and Louisville Water Company v. Hamilton, 81 Ky., 517, this court itself had expressly said that the taxes of such quasi public corporations as a railroad company or a water company could only be collected under the supervision of a

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court of equity; and that we had proceeded on this principle in bringing this suit and in drawing the judgment which was entered. But in response to this argument this court said:

"The cases of Johnson v. City of Louisville, 11 Bush, 527; Railroad Co. v. Trustees of Elizabethtown, 12 Bush, 233, and Louisville Water Co. v. Hamilton, 81 Ky., 517, are not in conflict with the views above expressed. *Expressions of a general character may be found in the argument in the opinions in those cases which seem to support a different view, but the question as now presented was not then before the court, nor was it decided.*

"In the last named case the water company sued out an injunction to prevent the sale of some property for its taxes. It was not sued for them. It voluntarily came into a court of equity, asking relief, and under such circumstances the court said: 'The chancellor having been appealed to by the appellant (the water company) for some sort of relief should have taken cognizance of the case and required the appellant, by rule, to pay the money into court, and if not, to place the management of the corporation in the hands of a receiver, in order that the burden might be discharged.' It is apparent that case is not this one.

"If, where a tax has been imposed and no remedy or any adequate one furnished for its collection by the statute, it were, in our opinion, a correct rule to imply the right to sue for it on account of the silence of the Legislature, yet we would not apply it in view of the fact that our Legislature has expressly provided that a railroad corporation may be sued for its taxes. (General Statutes, chap. 92, art. 3, sec. 5.)

"This was equivalent to a declaration by it that in the absence of such a statute no suit could be maintained. . . .

"Judgment reversed, with directions to dismiss the petition."

2. Res Adjudicata. The defense on which the court below dismissed the petition was that of *res adjudicata*.

There is no question presented here as to whether or not a judgment against the validity of a tax in one year can be pleaded as *res adjudicata* in a suit involving the taxes of a different year. The question in the case at bar is simply as to whether or not a judgment against the validity of a tax in a particular year is a bar to a suit to recover those same taxes for that same year.

The judgments in the injunction cases, enjoining the collection of the taxes claimed to be due to the county of Henderson from the Henderson Bridge Company, are distinctly pleaded in the answer of the bridge company to this suit by the county of Henderson. The reply filed by the county to the answer of the

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bridge company does not controvert a single allegation contained in the pleas of *res adjudicata*. Neither does counsel for the county (now appellant) question that the allegations in the pleas of *res adjudicata* are in due and proper form. The sole point made by the county is that in those injunction suits in which the judgments against the taxes were entered, and which are now pleaded as *res adjudicata*, the county was not *eo nomine* a party defendant, but that the sole defendant was the sheriff of the county, who, under the law, was the tax collector of the county, and was endeavoring as such to force payment of the taxes by the power of the law at the time he was enjoined.

It is true the judgments in those injunction cases were default judgments; but counsel for the county does not dispute the proposition that a judgment by default is just as effectual a bar to a subsequent suit as if it had been rendered after the most vigorous contest. And if this proposition was disputed, it is indisputably established by the authorities. (Last Chance Mining Co. v. Tyler Mining Co., 157 U. S., 683, 691; Harshman v. Knox County, 122 U. S., 318.)

One of the judgments in the injunction suits may be taken as a sample of all the rest as follows, to-wit:

"In this cause (No. 1118) it is adjudged that the injunction granted by the clerk, December 1, 1894, be, and the same is, made perpetual, and it is adjudged that the plaintiff does not owe, and the defendant is perpetually enjoined from collecting the sum of $1,488.82 as a State tax, or $515.39 as a county tax for the year 1894, or any part of either." (Rec. 63.)

Of course the petition in that case shows that the defendant referred to in the judgment is the sheriff of Henderson county, and that he was endeavoring to collect a tax claimed to be due to the State of Kentucky, and a tax claimed to be due to the county of Henderson, for the year 1894, from the Henderson Bridge Company. And the petition in the case at bar shows that the county is now seeking by this suit to collect this identical tax for this identical year from this same Henderson Bridge Company.

If it be true that the county of Henderson is not bound by the judgments in question and can maintain this suit to collect these taxes, then we suppose that it is equally true that the present sheriff of Henderson county, the successor to the sheriff who was enjoined, is not bound by the judgments in question and could to-day levy upon and sell for these taxes any property of the Henderson Bridge Company which he might be able to find which was outside of the bridge itself, and not absolutely

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necessary for the performance of the public duty which that company performs. And if this is true, then of course it is further true that the sheriff whom the bridge company sought to enjoin could have prevented a judgment by resigning before the judgment was entered; or could have rendered the judgment completely nugatory by resigning as soon as it was entered and allowing another sheriff or another tax collector to be appointed.

We believe the proposition that these judgments are not binding on the county of Henderson, because simply judgments against the sheriff of the county, when acting in his capacity as tax collector of the county, and because not against the county *eo nomine*, will be surprising certainly to the majority of the lawyers of the State, as it is to us. It may be true, as claimed by the counsel for appellant, that quite frequently suits have been brought against officials of the different cities or counties of the State, in which the municipality itself has been made a party defendant. But it is certainly true that the contrary practice has been very common, and that the principle justifying it has been asserted by this court more than thirty years ago and acted upon frequently. We know of no way of finding all the cases in reports where such practice has been followed, but we can certainly refer the court to a number of them, and in some of which the question of the character of such a suit was expressly considered and decided.

It is said that the sheriff does not in any sense represent the county; that the fiscal court represents the county. This proposition thus generally stated, we utterly deny. Counsel cites section 1834 of the Kentucky Statutes that "*unless otherwise provided by law*, the corporate powers of the several counties of this State shall be exercised by the fiscal courts thereof respectively." But in the matter of the *collection of taxes* it is "otherwise provided by law." The fiscal court has no more to do with the *collection* of county taxes than the sheriff has to do with the *levy* of county taxes. The fiscal court makes contracts for the county, and levies taxes to pay the county's obligations. The assessor then assesses, or places values upon the property in the county. The application of the tax rate fixed by the fiscal court to the assessment as fixed by the assessor shows the amount of taxes due from every property owner to the county. This having been ascertained, the sheriff then collects the tax. The fiscal court does not act for or represent the county in any matter pertaining to the assessment or collection of taxes. The assessor does not act for or represent the county in any matter pertaining to the levy or the collection of

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the tax. And the sheriff does not represent the county in any matter pertaining to the levy or the assessment of the tax. Each of these several officers or tribunals acts for and represents the county in the prescribed sphere of his own duties, but not in the sphere of the duties of the other. The result is that if no tax rate had been levied, and if the fiscal court was believed to be about to make a levy for the purpose of paying some obligation which a taxpayer denied, in such a state of case the taxpayer would bring his suit for injunction against the fiscal court to enjoin the making of the levy. On the other hand, if the levy had already been made, but no assessment had been made, he would bring his suit against the assessor to enjoin the assessment of the property. It would be needless to bring a suit against the fiscal court to enjoin the levy because the levy has already been made; and the fiscal court has nothing to do with the assessment which is the thing to be prevented. So again, if the levy has been made and the assessment has been made and the collection of the tax is all that is left, the injunction in such a case is brought against the sheriff, as the tax collector, because he is the representative of the county in the matter of collection, which is the one step sought to be enjoined. In such a case it would be idle to make either the assessor or the fiscal court a party to the proceeding. And while we do not say it would be *improper* to make the county *eo nomine* a party defendant, yet we do say it is not necessary, and that the contrary practice has been indulged in in this State certainly for more than thirty years, as it has also been in other States.

It is said the sheriff has no money to pay attorney's fees or stand the cost of litigation. But this point is only skin deep, for if there is any ground of defense, and the county chooses to make defense, the fiscal court can make an appropriation for the expense of the litigation just as well where the sheriff is the nominal party as where the county itself is the nominal party.

Moreover, as to the *likelihood* of defense being made, there is really more likelihood of defense where the shriff is made a party and the summons served on him than where the county is made a party and the summons served on the county judge, because the sheriff has a real substantial personal interest in the contest growing out of the fees or commissions that are allowed him for the collection of the tax, whereas, the county judge, on whom the summons would be served if the suit were brought against the county, has no personal interest in the matter whatever. The result is that suits against sheriffs or other

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officers of that kind rarely do go by default; and there is certainly no more likelihood that they will be allowed to go by default than if the county itself were made a party and the summons served on the judge. Of course there is a chance in either case that it may go by default. This is simply one of the chances of litigation.

Furthermore, as heretofore stated, if it could be charged that the default judgment was the result of fraud or collusion it might be attacked on that ground, but there is no such attack in the case at bar.

We respectfully submit that the judgment should be affirmed.

AUTHORITIES CITED.

1. No right to sue for taxes. Baldwin v. Hewitt, 88 Ky 673., Lou. Water Co. v. Commonwealth, 89 Ky., 244; Lou. Trust Co. v. County of Muhlenberg, 15 Ky. Law Rep., 397; Grand Rapids School Furniture Co. v. Trustees of Pike Co., 19 Ky. Law Rep., 1610; Central R. R. & Bridge Co. v. Com., 106 Ky., 329; Henderson Bridge Co. v. Negley, 23 Ky. Law Rep., 746; Lou. Bridge Co. v. City of Louisville, 23 Ky. Law Rep., 1655; Campbell county v. N. & C. Bridge Co., 23 Ky. Law Rep., 2056; Cov. & Cin. Bridge Co. v. O'Meara, 19 Ky. Law Rep., 1438.

2. Res adjudicata. Last Chance Mining Co. v. Tyler Mining Co., 157 U. S., 683, 691; Harshman v. Knox County, 122 U. S., 318; Maddox v. Graham, 2 Met., 56; City of Louisville v. Kean, 18 B. Mon., 13; State v. Canfield, Fla., 23 Sou. R., 59; Patton v. Stephens, 14 Bush, 324; Rogers v. Jacob, 88 Ky., 502; Mayor, &c., v. Wilson, 103 Ky., 326; Thompson v. United States, 103 U. S., 480; Hicks v. Cleveland, 106 Fed. Rep., 459; Sauls v. Freeman, 24 Fla., 209 (12 Am. St. Rep., 190); Gallaher v. City of Moundsville, 34 W. Va., 730; 26 Am. St. Rep., 946; Ashton v. City of Rochester, 133 N. Y., 187 (28 Am. St. Rep., 619); Lyman v. Farris, 53 Iowa, 498; Ransom v. City of Pierre, 101 F. R., 665; Zimmerman v. Savage, 145 Ind., 144; 44 N. E. Rep., 252; Schmidt v. L., C. & L. R. Co., 99 Ky., 151; Negley, Sheriff, v. Henderson Bridge Co., 21 Ky. Law Rep., 1154.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

The county of Henderson instituted suit against the Henderson Bridge Company to recover certain taxes alleged to be due for the years 1893, 1894, 1895, and 1896. The bridge company resisted judgment on the ground that every item of the taxes sued for had been adjudged illegal in suits

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brought by it against the sheriff of Henderson county, final judgment having been entered in each of these suits perpetually enjoining the collection of the taxes. The plaintiff demurred to the plea of res judicata. The court overruled the demurrer, and, the plaintiff declining to plead further, the action was dismissed. The only question to be determined on the appeal is whether the judgments rendered in the former actions by the bridge company against the sheriff bind the county, although it was not a party to those suits. In those cases the bridge company alleged that Henderson county had levied no tax for the years named, that its property had not been assesed for taxation, and that the sheriff had not been authorized to collect the tax. The sheriff did not answer the petition, and judgment by default was entered to the effect that the plaintiff did not owe the tax, perpetually enjoining the sheriff from collecting it. Appellee relies on the principle that a judgment against the legal representatives of a county is conclusive against it and all its citizens. The rule is thus stated in Freeman on Judgments, section 178: "The position of a county or municipal corporation towards its citizens and taxpayers is, upon principle, analogous to that of a trustee towards his *cestui que trust*, when they are numerous, and the management and control of their interests are by the terms of the trust committed to his care. A judgment against a county or its legal representatives in a matter of general interest to all its citizens is binding upon the latter, though they are not parties to the suit." To same effect is Black on Judgments, section 584. The principle stated in these sections is that a judgment against a county or its legal representatives in a matter of general interest to all the people of the county is binding not only on the official representatives of the county,

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but on all its citizens, though not made party defendant by name; otherwise there would be no end to litigation. But no question arises in this case between any of the citizens of Henderson county and appellee. The only question is whether the county is bound by default judgments in favor of appellee in actions between it and the sheriff, to which the county was not a party. The question how far a municipality may be bound by a judgment against one of its subordinate officers is not touched upon in either of these sections. In the latter part of section 178 of Freeman on Judgments, it is said: "Though its officer is a nominal party to a suit, and the municipality is not joined with it, a judgment is conclusive for or against it, if it was the real party in interest, and as such prosecuted or defended the action." The rule that one who prosecutes or defends an action in the name of another is bound by the judgment, though not nominally a party to it, is of general application, and has been recognized by this court. Schmidt v. L., C. & L. Railroad Co., 99 Ky., 143, 18 R., 65, 35 S. W., 135, 36 S. W., 168. But this rule does not apply here, as no defense was made to the action against the sheriff. The judgment against the municipality binds its citizens, because it is their legal representative; but can it be said that the county is bound by the default judgment against the sheriff for this reason? A judgment binds only parties and privies. The heir is bound by a judgment against his ancestor; the distributee by a judgment against the administrator; but, unless there is some privity, one person is never bound by a judgment against another. The ground upon which a municipality is held bound by a judgment against certain of its officers is that these are its legal representatives, who are by law authorized to speak for it and control its affairs; but this can not apply to subordin-

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ate municipal agencies having no power to speak for the municipality or control its action. In none of the adjudged cases has the municipality been held bound by a default judgment against any of its officers, except those who had charge of its affairs as its chief managing agents. Thus, in Lyman v. Faris, 53 Iowa, 498, 5 N. W., 621, the validity of a tax having been determined in an action against the board of supervisors, who were the managing agents of the county, it was held that an action to enjoin the collection of the tax could not be maintained by a taxpayer, as the supervisors represented all the taxpayers of the county in the defense which they had made to the former action on the same ground. To the same effect are State *ex rel.* Wilson v. Rainey, 74 Mo., 229; Harmon v. Auditor, 123 Ill., 122, 13 N. E., 161, 5 Am. St. Rep., 502. In Gallaher v. Moundsville, 34 W. Va., 730, 12 S. E., 859, 26 Am. St. Rep., 942, certain taxpayers, suing for themselves and all other taxpayers of the county, sought an injunction against the delivery of certain bonds, which was refused. Then other taxpayers, who were not named as parties in the first suit, brought a similar suit, suing for themselves and all other taxpayer. The first action was held a bar to the second. See, to same effect, McCann v. Louisville (23 R., 558), 63 S. W., 446. Were the rule otherwise in this class of cases, there could be no end to litigation until every taxpayer in the county had brought his individual suit. In Sauls v. Freeman, 24 Fla., 209, 4 South, 525, 12 Am. St. Rep., 190, the county commissioners were sought to be enjoined from moving the county records in a proceeding instituted by certain taxpayers. There had previously been a mandamus awarded against the commissioners to remove the records, and this judgment was held to bar the second suit; but the commisioners were empowered by law to remove the

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records and were, therefore, the representatives of the people of the county in this matter. State *ex rel.* Brown v. C. & L. Railroad Company, 13 S. C., 290, rests on the same ground. None of these cases involved a judgment against an inferior ministerial officer who was not by law intrusted with the disposition of the matters in controversy. In no case cited or decided, so far as we can find, has an inferior officer been allowed to accomplish indirectly by means of a judgment against him what he could not do directly. In all the cases where the judgment against the officer was held a bar, his official act without the judgment would have bound the municipality. The question, then, to be determined, is, has the sheriff in the collection of taxes such power, under our statute, as to make him the legal representative of the county so that a judgment against him will bind the county?

By section 4129, Kentucky Statutes, 1899, "the sheriff by virtue of his office shall be collector of all State, county, and district taxes, unless the payment thereof is, by law, specially directed to be made to some other officer." This statute confers upon him only power to collect the taxes. The mode of collection is pointed out in sections 4148, 4151, 4184, Id., by distraint, levy on land, or attachment. By section 4131, if the office of sheriff is vacant, the county court may appoint a collector of taxes. The powers of the sheriff are the same as those of the tax collector. By section 114 of the Constitution each county shall have a fiscal court, composed of the county judge and justices of the peace; or a county may have three commissioners, who, together with the county judge, shall constitute the fiscal court. Pursuant to this provision of the Constitution is section 1834, Kentucky Statutes, 1899: "Unless otherwise provided by law, the cor-

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porate powers of the several counties of this State shall be exercised by the fiscal courts thereof respectively." Also section 1840: "The fiscal court shall have jurisdiction . . . to regulate and control the fiscal affairs and property of the county, . . . and to execute all of its orders consistent with the law and within its jurisdiction, and shall have jurisdiction of all such other matters relating to the levying of taxes as is by any special act now conferred on the county court or court of levy and claims." By section 1883 the officer who may collect the State revenue in each county shall also collect the county levy. It will thus be seen that the entire control of the fiscal affairs of the county is vested in the fiscal court, of which the sheriff is not a member, and that his sole power in the matter of taxes is limited to that of a tax collector. The powers of a tax collector and the limitations upon his authority are thus well stated in Cooley on Taxation: "The authority of a collector of taxes to collect is his warrant. The duplicate is but a memorandum of the amount he is to collect from the parties therein named respectively. Without a warrant, the collector becomes a trespasser as soon as he intermeddles with the property of the taxpayer." Page 292. "It is not the business of the collector to question the fairness or propriety of any tax which has been committed to him for collection. If the assessment is excessive, the party assessed must make the objection, and not the collector. His duty is to collect the list committed to him, and he can not excuse himself for any failure to exhaust his authority in collecting on the pretense that the person taxed should have been assessed otherwise than he was." Page 500. "In general, any mere ministerial officer to whom process is issued, which proceeds from an officer, or board, or other body having authority to issue process of that

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nature, which process is legal in form, and contains nothing on its face to notify or apprise him that it is issued without authority, will be protected in serving it, even though in fact it was issued without authority of law. This is a rule not only essential to the protection of such officers, but absolutely required also for the due dispatch of public business." Page 559. The tax collector, therefore, in the collection of his tax warrants, stands substantially as the sheriff in executing a *fi. fa.* or other final process which is delivered to him. In acting under such a writ the officer is protected if the writ is valid on its face. He is not the agent of the plaintiff. The sale made by him is the act of the law, and the plaintiff in the writ is in no way bound by the acts of the officer if he leaves the law to take its course without directing the officer in the discharge of his duties. Freeman on Executions, section 273; Rorer on Judicial Sales, section 46. The sheriff, in the collection of his revenues, is a ministerial officer, charged with a specific duty, which is to collect the money on the tax bills, and pay it over to the person entitled to receive it. He is without power to dispose of the fund, or to release the taxpayer from liability, or to reduce the amount to be paid by him, or to do anything involving the fiscal interests of the county. He has no authority to represent the county in any litigation. He can not employ counsel for it, or subpoena witnesses on its behalf, or do any act at its expense, however necessary, in the litigation for the protection of its rights. In the collection of the public dues, he is simply the agent of the law, performing duties imposed on him by the law. The county is not responsible for his acts out of court unless it directs or controls them; and the same rule must apply to his acts in court, for he can not accomplish by nonaction in court what he could not accomplish by di-

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rect action out of court. The law does not impose on the sheriff the burden of defending suits against the county. The expense of such litigation might be far beyond his means. When the rights of the county are to be determined, it should be sued, so that it may control the defense, pay the expenses, and take such steps as its interests may require. There are other officers charged with certain duties ministerial in character in connection with the collection of taxes that must be regarded as the representatives of the county if the sheriff can be so regarded. Thus it is the duty of the assessor to assess the taxpayers. But it would not be maintained that a default judgment suffered by an assessor enjoining him from assessing the property of a taxpayer would bar the State or the municipality from proceeding under section 4241, Kentucky Statutes, 1899, to have the omitted property assessed. It is the duty of the county clerk to copy the tax list and deliver the copy to the sheriff for him to collect on. If a taxpayer were to enjoin the county clerk by a default judgment from copying his list and delivering it to the assessor, this judgment would not conclude the Commonwealth or the county, or prevent it from collecting its taxes.

None of the tax cases decided by this court touch the question. It is true, suits to test the validity of taxes have been brought in the name of the sheriff, and, where the litigation has been conducted by the State or municipality in the name of the officer, it is bound by the judgment; but the interests of the municipalities of the State, as well as sound legal principles, require that they should be made parties defendant to actions against the tax collector, where the purpose of the action is to prevent them from collecting their revenues, for the power to tax involves the power to exist, and their usefulness might be crippled or

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destroyed if the collection of taxes levied for their support could be defeated by judgments in actions over which they had no control. A county may be sued. Section 51 of the Civil Code of Practice provides: "In an action against a county the summons must be served on the presiding judge of the county court, or, if he be absent from the county, upon its attorney." In People v. Squire, 110 N. Y., 666, 18 N. E., 362, the plaintiff had obtained a mandamus against the commissioner of public works, and relied on that judgment as *res adjudicata* between him and the city. The court, deeming the matter free of doubt, simply said: "The city of New York is not a party to the litigation, and is not bound by any judgment heretofore entered in this proceeding." In the subsequent case of Peck v. State, 137 N. Y., 372, 33 N. E., 317, 33 Am. St. Rep., 738, the court, approving this case, said: "In People v. Squire, 110 N. Y., 666 [18 N. E., 362], we held that a judgment in a mandamus proceeding against the commissioner of public works for the city of New York did not bind the city for the reason that it was not a party to the litigation." In Gilmore v. Fox, 10 Kan., 509, a suit was brought against the county clerk and county treasurer to enjoin the collection of certain assessments made by the city of Emporia, without making it a party. It was held that the city was the real party in interest, and was a necessary party to the action. The court said: "If the city can not collect these special assessments, it must resort to general taxation to raise the amount. But, before it can be properly determined that the city can not collect these special assessments, the city must have its day in court." The same principle was followed in Voss v. Union School District, 18 Kan., 467, where a suit to enjoin a collection of taxes was brought against the treasurer and sheriff. The court said: "Said treasurer

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and sheriff were merely nominal parties, and the school district was the real party in interest." To the same effect are Knopf v. Chicago Real Estate Board, 173 Ill., 196, 50 N. E., 658; Heinroth v. Kochersperger, 173 Ill., 205, 50 N. E., 171, and Bradley v. Gilbert, 155 Ill., 154, 39 N. E., 593. In the last case an effort was made to enjoin the action of the county board as to dieting prisoners without making the county of Cook defendant. The court said: "Whatever may be said as to the right or policy of county boards to adopt the method of fixing the amount to be paid for dieting prisoners shown by this bill to have been pursued in Cook county, before that method can be judicially pronounced contrary to law and void, the alleged offender must be given its day in court." See, also, Beach on Injunction, 373; Carpenter v. Grisham, 59 Mo., 251; Samis v. King, 40 Conn., 312; Lefferts v. Board of Supervisors, 21 Wis., 688; 10 Ency. of Pleading and Practice, 913, 914; Attala County v. Niles, 58 Miss., 48.

The other questions made in the case seem to be settled in Henderson Bridge Co. v. Negley, 23 R., 746, 63 S. W., 989; Louisville Bridge Co. v. Louisville, 23 R., 1655, 65 S. W., 815; Campbell County v. Bridge Co., 23 R., 2056, 112 Ky., 659, 66 S. W., 526.

The judgment is reversed, and cause remanded, with directions to sustain the demurrer to so much of the answer as pleads the former adjudication in bar of the action, and for further proceedings consistent herewith.

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CASE 15—ACTION OF HART COUNTY AGAINST LOUISVILLE & NASHVILLE R. R. CO. TO COMPEL DEFENDANT TO ISSUE TO PLAINTIFF CERTIFICATES OF STOCK FOR INTEREST WHICH MATURED ON PLAINTIFF'S SUBSCRIPTION TO THE CAPITAL STOCK OF DEFENDANT COMPANY, &C.—JUNE 19.

Louisville & N. R. R. Co. v. Hart County. Hart County v. Louisville & N. R. R. Co.

APPEAL FROM HART CIRCUIT COURT.

FROM THE JUDGMENT BOTH PARTIES APPEAL. AFFIRMED ON PLAINTIFFS' APPEAL. REVERSED ON DEFENDANT'S APPEAL.

CORPORATIONS—INTEREST ON PAID-UP CORPORATE STOCKS—STOCK DIVIDEND—EFFECT—ESTOPPEL—CORPORATE RECORDS—PRESUMPTIONS.

Held: 1. Under 2 Acts 1850-51, page 444, chapter 505, section 5, which provides that a certain railroad "shall allow to all subscribers and holders of stock under the company, interest on the same from the time of paying for said stock" up to the time of making the first dividend, interest did not begin to run on the stock from the date on which a county subscribing therefor issued bonds in payment thereof, but from the date of the delivery of the bonds to the company, though the bonds bore date anterior to their delivery, and the purchasers thereof would be entitled to interest from their date.

2. Evidence that counties, as subscribers of stock in a railway corporation, frequently delivered their bonds in payment of stock subscriptions after the time the bonds bore date, tends to overcome the presumption that bonds issued by a particular county in payment of stock subscribed by it were delivered to the corporation the day they were dated.

3. Where there was no evidence to impeach the correctness of the record of a corporation showing the transactions between it and their stockholders, had about fifty years before, its record showing the date a subscriber paid for stock by delivering to it bonds is the best evidence as to the date when the stock was paid for.

4. Under Acts 1851-52, page 742, chapter 429, section 15, which provides that a certain railroad shall, on the date of the first dividend, and thereafter on presentation and surrender at the company's office of tax receipts for taxes paid to defray interest on bonds given by a county in payment of corporate stock, issue to

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the holders of tax receipts stock for the same, and 1 Acts 1855-56, page 188, chapter 20, section 4, which declares that the holders of stock issued to such taxpayers shall be entitled to all the rights and privileges of stockholders, except that such stock shall not bear interest, a taxpayer paying taxes to defray interest on county bonds issued in payment of corporate stock is entitled to an amount of stock equal to the tax receipt, together with all cash and stock dividends, declared on such stock.

5. A corporation was required to allow to all stock subscribers interest from the time of paying for the stock to the time of making the first cash dividend. In 1861 it declared a stock dividend as of April 1st following. A stock subscriber denied the right of the corporation to stop the running of interest, except by its declaring a cash dividend. At the meeting declaring this dividend, a county, as stock subscriber, was represented by a sinking-fund commissioner. At a subsequent meeting of stockholders, the county was represented by two sinking-fund commissioners, who joined with other stockholders in declaring invalid the claim of the stockholder denying the right to stop interest except by a cash dividend. Subsequently the corporation declared and paid several cash dividends on the basis that interest stopped by the payment in 1862 of the dividend declared in 1861, and the county acquiesced therein. HELD, that the county was estopped from claiming that interest continued to the time the corporation declared the first cash dividend.

6. A transferee of corporate stock acquires the right to any interest due on the stock, though payable in stock instead of cash.

McCANDLESS & JAMES, FOR APPELLANT, HART COUNTY.

SYNOPSIS.

THE QUESTION INVOLVED ON ORIGINAL APPEAL.

1. The subscription was paid April 1, of the years 1853-4-5.

THE QUESTIONS INVOLVED ON CROSS-APPEAL.

1. Hart county was entitled to stock for interest to June 30, 1864. (1) The question as an original proposition. (2) The Hardin county case as an authority.

2. Hart county was entitled to dividends on all stock she held at the date of the declaration of the dividend. (1) As to the disputed stock. (2) As to tax receipts converted.

3. The court had no authority to impose any conditions.

4. There existed no estoppel.

5. Hart county has never sold the stock claimed.

6. The cause of action was not barred by limitation. 1. As to the stock. (a) The cause of action accrued within five years

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before suit. (b) Fifteen-year statute applied. (c) Not a liability created by statute. 2. As to the dividends. (a) Before the suit was filed. (b) After the suit was filed.

AUTHORITIES CITED.

Cook on Corporations (4th ed., 1898), secs. 1, 2, 10, 11, 13, 16, 191, 281, 282, 279, 492, 539, 540, 546, 531, 582, 583, and 584; Morawetz on Corporations, sec. 149; Roer on Railroads, p. 33; Wood's Field on Corporations, sec. 111; Greenleaf on Evidence, sec. 20; Story's Equity Jurisprudence, sec. 1543; Bigelow on Estoppel (4th ed.), p. 679; Am. & Eng. Ency. of Law (2d ed.), vol. 4, 624; vol. 8, 729, 730; vol. 9, 683, 892, 903, 904, 920; vol. 16, 143; Stanton's Revised Statutes, chap. 27, art. 19, sec. 3; chap. 53, art. 1, sec. 2; chap. 53, art. 3, secs. 1 and 2; Hardin County v. L. & N. R. R. Co., 92 Ky., 412; Seymour v. Van Slyck, 8 Wend. (N. Y.), 403; Shoptaw v. Ridgeway, 22 Ky. Law Rep., 1495; State v. Main, 63 Conn., 123; s. c., 36 L. R. A., 623; Scott v. Marshall, 5 J. J. Mar., 434; Hickman v. Skinner, 3 Mon., 211; Vincent v. Eaves, 1 Met., 250; Oldham v. Jones, 5 B. Mon., 452; Lawhorn v. Carter, 11 Bush, 7; Gale v. Norris, 2 McLean (U. S.), 460; Bunting v. White, 3 Houst. (Del.), 551; Walden v. Savings Bank, 19 Ky. Law Rep., 1410; Miss., &c., v. Cross, 20 Ark., 443; Glen v. Saxton, 10 Am. & Eng. Cor. Cas.; Glen v. Williams, 60 Md., 33; s. c., 1 Am. & Eng. Cor. Cas., 58; Fry v. Lexington, &c., Co., 2 Met., 314; Mobile, &c., Co. v. Tennessee, 153 U. S., 486; Farris v. Bush, 7 Bush, 277; Ray v. Longshaw, 4 Ky. Law Rep., 904; Stacy v. Holiday, 9 Ky. Law Rep., 517; Lasley v. Lackey, 4 Ky. Law Rep., 97; Copeland v. Copeland, 7 Bush, 349; Price v. Price's heirs, 6 Dana, 107; Richardson v. Grant Co., 27 Fed. Rep., 495; Reichard v. Warren County, 31 Iowa, 381; Thomas v. Harmon, 46 Hun. (N. Y.), 77; Pittsburg, &c., Co. v. Allegheny County, 63 Penn. St., 126; s. c., 4 Am. Cor. Cas., 92; Boardman v. Lake Shore, &c., Co., 84 N. Y., 157; Jermain v. Lake Shore, &c., Co., 91 N. Y., 483; Mercer County v. Springfield, &c., Co., 10 Bush, 254; Owingsville, &c., Co. v. Bondurant's admr., 21 Ky. Law Rep., 1218; Lynne v. Bank of Ky., 5 J. J. Mar., 559; Holbrook v. Ives, 7 West. Rep. (Ohio), 201; Kimball v. Thurman, 14 Ky. Law Rep., 718; Kenton County v. Lowe, 91 Ky., 367; Sullivan v. Sullivan, 20 S. C., 79; S. C., 6 Am. & Eng. Cor. Cas., 287; Gibson v. Columbia, &c., Co., 18 Ohio St., 86; Elliott v. Saufley, 89 Ky., 52; Royce v. Reynolds, 10 Bush, 286; Harrison County v. Smith, 15 B. Mon., 165; Winchester, &c., Co. v. Wickliffe's Admr., 100 Ky., 531; Ryder v. Alton, 13 Ill., 516; Hughs v. Vermont Copper Co., 72 N. Y., 207; S. C. 8 Am. Cor. Cas., 512; City of Louisville v. Meglemry, 21 Ky. Law Rep., 751.

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HELM, BRUCE & HELM, FOR L. & N. R. R. Co.

POINTS AND AUTHORITIES.

1. He who seeks equity must do equity. Willard v. Tayloe, 8 Wall., 557; Usher v. Flood, 83 Ky., 552; Johnson v. Rowe, 1 Ky. Law Rep., 274; Lou. Water Co. v. Hamilton, 81 Ky., 523.

2. The person equitably entitled to stock in a corporation is the one entitled to receive dividends thereon, though the certificate may not have been issued or transferred to him. Morawetz on Corporations, sec. 178; Currie v. White, 45 N. Y., 832; Black v. Hammershaw, L. R., 4 Exch., 24.

3. The interest on the stock subscription of appellant properly began to run from the date of *delivery* of her bonds delivered in payment of her subscription, *as shown by the books of the company* and *not from the date of the bonds.* Turnbull v. Payson, 95 U. S., 421; Stone v. Kellogg, 165 Ill., 204; 56 Am. St. Rep., 242.

4. Hart County is estopped from maintaining the claim asserted in this action. Simpson County v. L. & N. R. R. Co., 14 Ky. Law Rep., 674.

5. If Hart county ever had a just claim to the *interest* stock she now seeks to recover, she sold and transferred it when she sold her *principal* stock in 1879. Boardman v. Lake Shore R. R. Co., 84 N. Y., 157; Jermain v. Lake Shore R. R. Co., 91 N. Y., 483; Manning v. Quicksilver Mining Co., 24 Hun, 361; Florence v. Drayson, 1 Com. Bench (N. S.), 584.

Cases explained: Ohio City v. Cleveland & Toledo R. Co., 6 Ohio, 489; Pittsburg, &c., R. Co. v. Allegheny City, 63 Pa. St., 126.

6. Limitation. Mercer County v. Springfield Turnpike Co., 10 Bush, 254; Owingsville Turnpike v. Bondurant, 21 Ky. Law Rep., 1219; Young v. Ashland, &c., Ry. Co., 19 Ky. Law Rep., 491; Gilmore v. Green, 14 Bush, 774; Rev. Stat., ch., 63, art. 3, sec. 2; Royse v. Reynolds, 10 Bush, 286; Treadway v. Pharis, 90 Ky., 663; Hoffert v. Miller, 86 Ky., 572; Winchester Turnpike v. Wickliffe, 100 Ky., 531.

In conclusion therefore we submit the following propositions in the reverse order to that which they were presented, viz.:

1. The action is barred by limitation.

2. If plaintiff had a right to the interest stock claimed, it sold and transferred it with its principal stock in 1879.

3. Plaintiff is estopped from making its present claim.

4. Interest on plaintiff's subscription ran only from the delivery of its bonds, which was on August 4, 1853, August 6, 1856, and September 30, 1857.

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5. The taxpayers, and not plaintiff, were entitled to the dividends declared to the extent of taxes theretofore paid, though no certificates had actually been issued to them at the time.

6. He who seeks equity must do equity; and if plaintiff insists on having *interest* stock from April 1, 1862, to July 1, 1864, it can not *also* retain the *dividend* stock which was issued within that period on the assumption that the interest stock had ceased.

We therefore ask that the judgment be reversed on the cross-appeal of the Louisville & Nashville Railroad Company with directions to dismiss the petition.

McCANDLESS & JAMES, ON PETITION FOR REHEARING.

POINTS MADE.

1. The court misstates the purpose of the action, thus showing that the record was not fully understood.

2. The judgment is unjust. By adhering to the case of Hardin County v. L. & N. R. R. Co., 92 Ky., 412, the court concedes the right of Hart county to stock for interest paid between 1862 and 1864, but it refuses to compel the recognition of her right to this stock without any sufficient reason, and, not only this, it holds that she has received several thousand dollars in stock for interest which she paid before the "bills receivable" were credited, that should not have been allowed her, notwithstanding it was the manifest intention of the charter that she should receive a dollar in stock for each dollar she paid in interest before the first dividend was made, and, notwithstanding the company for more than forty years conceded her right to this stock.

3. The court, in discussing the time from which the county should have been allowed stock for interest paid on her bonds, did not consider many material facts and presumptions arising therefrom. It erroneously holds that a copy of a supposed ledger account is competent evidence to prove a negative proposition.

4. The right of the county to dividends paid tax-receipt holders before they converted the tax receipts into stock is doubtful, and we do not further insist on the same.

5. From a statement of the facts which is entirely erroneous, the court holds that the county is estopped from asserting her right to the stock for interest paid between 1862 and 1864, whereas a correct statement of the facts shows that under the law no estoppel exists.

6. Through a misconception of the nature of corporate stock, the court has erroneously held that one share of stock can be,

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and is, an "incident" to another share, the stock which the county received for interest paid was entitled to the same rights as was the stock which she received for the original sum paid, the authorities which the court cites, not only fail to support its conclusions, but show conclusively the fallacy of its position.

OPINION OF THE COURT BY JUDGE PAYNTER—AFFIRMING ON APPEAL OF HART COUNTY AND REVERSING ON CROSS-APPEAL OF L. & N. R. R. Co.

The charter of the Louisville & Nashville Railroad Company was granted on March 5, 1850. Several amendments to it were passed by subsequent Legislatures. The company was organized by the election of directors in September, 1851. Under the charter, the counties through which the proposed line of railroad was to be constructed were authorized to subscribe to the capital stock of the company. The city of Louisville was also authorized to subscribe therefor. The counties and municipalities seem to have subscribed for $3,200,000 of it. In January, 1853, Hart county subscribed for $100,000 of the stock, but did not pay for same when subscribed. To pay the subscription the county issued bonds aggregating $100,000. The appellee claims that the bonds were delivered to it as follows: August 14, 1853, $33,000; August 6, 1856, $33,000; and September 30, 1857, $34,000. The bonds bore dates as follows: April 1, 1853, $33,000; April 1, 1854, $33,000; and April 1, 1855, $34,000. To obviate the necessity of an elaborate statement of the facts as to the differences out of which this suit grew, they will be made to appear as far as necessary in our discussion of the questions involved. This action was filed on March 23, 1870, and the answer was not filed for many years thereafter. The action was brought in equity, and for the purpose of compelling the appellee to issue to her certificates of stock for interest which matured on her subscription to the capital stock during certain

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periods, for certificates of stock for taxes paid by the taxpayers of the county to meet the interest which matured on the bonds which had been issued to pay for her subscription, and also to recover certain alleged cash dividends which she claimed she was entitled to receive. For convenience, we will designate Hart county as appellant, and the Louisville & Nashville Railroad Company as appellee.

The first question that will be considered is, did interest accrue on the subscription from dates on which the appellee claims the bonds were actually delivered to it in payment of the subscription?

Section 5 of the act of March 20, 1851 (2 Acts 1850-51, p. 444, c. 505), reads as follows: "Said company shall allow to all subscribers and holders of stock under the company, interest on the same from the time of paying for said stock up to the time of making the first dividend, and to issue to the holder stock therefor; and when stock shall be subscribed for a branch they may provide that said stock shall not be entitled to draw dividends until said branch is completed, but may allow interest on the payments up to the completion thereof, and pay it in stock." It will be observed that it is made the duty of the company to allow interest on the stock issued by it, from the time of paying for the stock up to the time of making the first dividend, and to issue to the holders of stock certificates therefor. The counties were authorized to issue bonds to pay their stock subscriptions. Although the bonds delivered to the appellee in payment of the stock subscription bore date anterior to the delivery of the same, and although the party who purchased them would be entitled to the interest thereon from their date, still the interest on the subscription for which stock was to be issued did not begin to run until the subscription was actually paid—in this case,

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until the stock was actually delivered in payment of the subscription. The interest on the bonds and interest on the stock subscriptions are separate and distinct things provided for in the charter and amendments. As an inducement to the counties to subscribe for the capital stock of the appellee, interest was to be paid on the subscription from the date of its payment. Besides, the charter provisions indicated a hope of the promoters that the dividends declared on the stock would pay the interest on the bonds. And it was therefore provided that, if they did not do so that the taxpayers, who were required to pay taxes for that purpose, were entitled to certificates of stock in the company for the amount of the taxes paid by each. The bonds having been delivered almost a half century ago, no one could possibly have any recollection as to the dates they were delivered in payment of the stock. It was the business of the company to keep a record of the transactions between the company and subscribers to the capital stock of the company. Their books should have shown who were subscribers, the amount of each subscription, and the date the bonds were delivered in payment of the subscription. This is an action by one who at that time and for many years thereafter in part constituted the corporation. The county had the right at any time to examine the books of the company. In Turnbull v. Payson, 95 U. S., 421, 24 L. Ed., 437, the court said: "Where the name of an individual appears on the stock book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock, in case where there is nothing to rebut that presumption; and, in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant." If the books of the appellee are *prima facie*

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evidence that one is a stockholder, they would be still stronger evidence, when it is admitted a party is a stockholder, to show when he paid his subscription. There was no evidence offered to impeach the correctness of the record kept by the appellee as to the time the bonds were delivered, nor to overcome the presumption that the record was correctly kept. Counsel for the appellant contend that the presumption should be indulged that the bonds were delivered on the day they bear date, but there is evidence in the record which shows that counties frequently delivered their bonds in payment of stock subscriptions after the time they bore date, and this fact tends to overcome the presumption claimed by counsel for the appellant to exist. Our opinion is, however, that the record kept by the company showing date of delivery in this case is the best evidence as to the date when the stock subscription was paid.

The county contends that the holders of tax receipts were only entitled to the dividends that were declared after the stock was delivered to them for same. The appellee claims that it issued to the holders of tax receipts, when presented, an amount of stock equal to the tax receipt, and also all cash and stock dividends which had been declared on the stock issued for the tax receipts. The claim is made that the county is entitled to the dividends as in the case where stock is sold after a dividend has been declared. There was no sale by the county of her stock to a taxpayer. The stock went to the taxpayer by virtue of the statute. At the time these taxes were paid, or at least part of them, the county did not hold certificates for her stock. Until the certificates for the stock were issued, the county's claim for stock was of the same equitable character as was that of the taxpayer to the stock which the law declared he was

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entitled to upon the payment of taxes. The law compelled the tax-paying citizens of Hart county to pay for the stock for which she subscribed, by paying taxes to be used in the payment of interest and principal of her bonds. Section 15 of the act of January 9, 1852 (Acts 1851-52, p. 742, c. 429), reads as follows: "That the said Louisville & Nashville Railroad shall, upon the date of the first dividend, and thereafter upon presentation and surrender, at the office of the company, of tax receipts for taxes paid to defray interest upon bonds given by any county, under this act, issue to the holders thereof stock for the same. Said tax receipts shall be negotiable by endorsement, and no stock shall be issued for a less amount than one share." By section 4 of the act of January 17, 1856 (1 Acts 1855-56, p. 188, c. 20), it was provided that the county courts shall appoint the clerk of the county or circuit court, or one of the commissioners of the sinking fund, to issue certificates to the taxpayers, etc., of taxes paid, when the amount due the holder is $100. This is to be done at the end of each month. The concluding clause of section 4 is as follows: "The holders of such stock shall, to all intents and purposes, be entitled to all the rights and privileges of stockholders, but such stock shall not bear interest." The stock thus held by a taxpayer or his assignee was entitled to all rights and privileges of other stockholders, except such stock "shall not bear interest." The ownership of the stock by a taxpayer did not depend upon the fact that he held a certificate from the clerk or commissioner, but upon the fact that he had paid taxes. It is shown that the appellee delivered the stock to the taxpayers or their assignees as required by the act. After having fully and satisfactorily met the demands of the taxpayers or their assignees, the county is here asking that she be adjudged cer-

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tificates for part of the amounts for which the appellee has issued stock to the taxpayers or their assignees. In other words, the county demands certificates of stock, and dividends thereon, which by the express terms of the statute are declared to belong to others. There is absolutely no merit or justice in the claim, and it would certainly be very inequitable to allow it.

There is another question in the case, involving the right of the county to have issued to her stock for interest which accrued on her subscription between April 1, 1862, and June 30, 1864; the latter being the date on which the first cash dividend was made. In October, 1861, at a stockholders' meeting, a one-fourth of 1 per cent. stock dividend was declared, of date of April 1, 1862. Hardin county, being one of the counties which had subscribed for stock, denied the right of appellee to stop the running of interest on stock subscriptions by declaring the stock dividend mentioned; her contention being that nothing but the declaring of a cash dividend would stop interest on the stock subscriptions. Although her representative was present at the meeting, and made no objection to the proceedings declaring the dividend, yet the county repudiated it, and continued to do so, and at subsequent meetings of stockholders protested against it, which culminated in a suit which finally reached this court, which held that the interest did not cease to run on the subscription until the cash dividend was declared, in June, 1864. Hardin County v. Louisville & Nashville Railroad Company, 92 Ky., 412, 14 R., 401, 17 S. W., 860. The conclusion of the court is now adhered to. Therefore the necessity is obviated to again discuss the question. The course Hart county pursued is entirely different from that of Hardin county. At the meeting declaring the one-fourth of 1 per cent. divi-

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dend, Hart county was represented by one of her sinking fund commissioners. At the meeting of the stockholders in 1865, the question arose as to the claim and position of Hardin county; she claiming that she was entitled to stock for interest which accumulated between April 1, 1861, and June 30, 1864, and the dividends on that stock, as well as the other stock held by her. At this meeting Hart county was represented by two of her three commissioners, and Hardin county's claim was unanimously denied, and proper record was made thereof. This action was acquiesced in until this suit was filed. In the meantime several cash dividends were declared upon the basis that none of the counties (and there were many of them) were entitled to stock for interest during the time mentioned, or dividends thereon. Hart county joined with all the other counties in thus construing their rights under the charter. All other counties, except Hardin, acquiesced in this interpretation of their rights under the charter as amended, and never did assert any claim against the company for interest stock covering the period in question. Thus Hart county voted that she and the other counties were not entitled to this stock, and the other counties adhered to that conclusion, and never claimed or received such stock. Hart county now attempts to repudiate the action taken with the approval of her representatives at the stockholders' meetings, and claims that which she formerly said she did not own. After the proceedings at the stockholders' meetings, she stood by and saw other counties who had subscribed for stock acquiesce in the action of the stockholders; saw the appellee declare and pay dividends upon the basis that the right to such stock did not exist in stock-subscribing counties and municipalities. It is suggested that there is nothing to show that these commissioners were present at the

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meeting of the stockholders by authority of Hart county. The law authorized them to be present at such meetings to represent the county, and we must presume, after the lapse of so many years, that they were there acting with the consent and approval of the county, and we therefore say that Hart county acquiesced. The reason for refusing to grant relief on this claim of Hart county is as good as it was in the case of Simpson County v. Louisville & Nashville Railroad Company, 14 R., 673, 19 S. W., 666, wherein Judge Lewis, delivering the opinion of the court, said: "If the county court had authority to so order application of the stock dividends, the county and sinking fund commissioners as well are estopped to claim the stock from the company, for it was disposed of and applied precisely in accordance with the order and direction of that court. And if it be conceded, as is argued, that the sinking fund commissioners, and not the county court, had the right to control and dispose of the dividend stock, their conduct was not such as to entitle them to relief that involved injustice to the company, that is not shown to have acted in bad faith. For the evidence is entirely satisfactory that they knew of and consented to, if they did not directly advise, the action of the county court, and also were aware of the fact that the company was applying the stock as directed and authorized by the county court. Yet they made no objection then, nor thereafter, for more than five years. To suppose the commissioners were not aware of the disposition that was being made of the stock in question, that they now claim to have had the exclusive right to hold and control, is to assume they were utterly unmindful of their duties; and, if they did know, it was their duty to then speak, and, having acquiesced so long, they can not now equitably ask the relief sought." We

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are of the opinion that it would be inequitable to the other stockholders and to the appellee to grant this relief, and we therefore conclude that Hart county has been estopped by her action to demand it.

From the conclusion we have reached, that Hart county was not entitled to the stock claimed, it necessarily follows that she is not entitled to any dividends thereon.

In addition to the other reasons given for denying the county's right to recover interest stock, there is another which we deem conclusive. Hart county in 1879 sold her principal stock. By section 5, supra, she was entitled to interest on her principal stock from the time she paid for it to the date of the first cash dividend, and for which she was entitled to have stock issued to her. This interest was like any other interest that might accumulate upon a debt, but, instead of its being paid in cash, it was to be paid in stock. It was an incident to the principal stock, exactly the same as interest is an incident to a debt. If the debt is assigned, and interest has matured thereon, the interest passes to the assignee as effectually as the debt. If the interest had been payable in cash instead of stock, the party to whom the county transferred the principal stock would certainly at the same time have acquired the interest due thereon. This is because it would have been an incident to the stock. The mere fact that the appellee could pay it in stock did not make it different from what it would have been, had it been payable in cash. We are of the opinion that, when she sold and transferred her principal stock, if any interest had been due thereon (we have said none was), it would have passed to the purchaser. This view is supported by Boardman v. Lake Shore Railroad Co., 84 N. Y., 157; Jermain v. Lake Shore

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Railroad Co., 91 N. Y., 483; and Manning v. Quicksilver Mining Co., 24 Hun., 361.

In view of the conclusions reached, we have not thought it necessary to discuss the effect of the 10½ per cent. stock dividends declared, nor the question of limitation.

The judgment is affirmed on the appeal of Hart county, and reversed on the appeal and cross-appeal of the Louisville & Nashville Railroad Company, for proceedings consistent with this opinion.

Response by Judge Paynter to petition for rehearing.

PER CURIAM. It is not a difficult matter for zealous counsel to conclude that a court has not fully understood the record, when its conclusions on the facts and the law do not accord with their views. This is unfortunate, but it has always been so, and will continue to be, so long as courts exist, and lawyers are unsuccessful in the prosecution of cases before them. The alleged inaccuracy of the court in summarizing the purpose of the action had not the slightest effect on the conclusion of the court. On the contrary, the court accurately states the claim of the county as to its alleged right to dividends on stock issued to taxpayers or their assignees before such certificates of stock were so issued. Notwithstanding the criticism which counsel saw proper to make of the opinion of the court, wherein the purpose of the action was stated with reference to the claim to which we have just referred, counsel who filed the petition for a rehearing were so impressed with the opinion of the court on that question that they were moved to say in the petition for rehearing, "We have regarded the right of the county in this particular as doubtful, and will not further insist upon the same."

In the opinion of the court it is stated that in Hardin

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County v. Louisville & Nashville Railroad Co., 92 Ky., 412, 14 R., 401, 17 S. W., 860, "the interest did not cease to run on the subscription until the cash dividend was declared, in June, 1864," and "the conclusion of the court is now adhered to." Counsel criticise the opinion because they seem to conclude that the court did not follow the Hardin County case. The court did adhere to it in holding that the stock dividend of one-quarter of 1 per cent. did not stop the running of interest, and that the interest was not stopped until the payment of a cash dividend. However, on the question of estoppel the court said the facts of this case are essentially different from those of the Hardin County case. The court in the Hardin County case refused to apply the doctrine of estoppel. In this case the court did apply it to an essentially different state of facts. The criticism of counsel could only be justified upon the theory that, because the court refused to apply the doctrine of estoppel against one county, it can not do it against another county on a different state of facts. The court admits an error in saying that Hart county was represented at a certain meeting of stockholders, but the correction of this error does not render it improper to apply the doctrine of estoppel to the facts of this case. It might be conceded that the court reached an erroneous conclusion on all the questions adjudged, save the one wherein the court held that the assignment of the principal stock carried with it the claim for interest stock; still Hart county was not entitled to recover. The court adheres to the conclusion reached on that question.

The whole court (except Judge Hobson, who did not sit in the case) considered the petition for a rehearing and overruled it.

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CASE 16—ACTION BY F. P. TOOF, &C., AGAINST JAMES MCNULTY AND OTHERS, INVOLVING THE VALIDITY OF A CITY ORDINANCE, RESTRICTING THE SALE OF LIQUORS, &C.,—JUNE 20.

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McNulty and Others v. Toof and Others.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFFS APPEAL. REVERSED.

MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—TITLE—SUFFICIENCY—ADOPTION—RECORDS—POLICE POWERS—INTOXICATING LIQUORS—CLOSING SALOONS—PENALTIES—ACTION—PLEADING.

Held: 1. An ordinance entitled an ordinance prohibiting the dispensing of spirituous liquors during certain hours, closing saloons, coffee houses, and like places of business during such period, and requiring the removal of obstructions to the interior view from saloons, coffee houses, or like places of business, is not repugnant to Kentucky Statutes, section 3059, providing that no ordinance shall embrace more than one subject which shall be expressed in the title.

2. Under Kentucky Statutes, section 3058, conferring power on certain cities to regulate the selling or giving away of spirituous liquors by any person within the city other than those duly licensed, and to pass such ordinances as may be expedient in maintaining the peace, good government, health, and welfare of the city, an ordinance prohibiting the dispensing of spirituous liquors between certain hours of the night, requiring the closing of saloons, and the removal of obstructions from the interior view of saloons, is authorized.

3. A provision in the ordinance prohibiting druggists from dispensing spirituous liquors between certain hours of the night is invalid, a druggist not being permitted to dispense liquors at any time as a drink.

4. The ordinance, in prohibiting wholesale liquor dealers from dispensing liquors during certain hours, is invalid.

5. An ordinance, in declaring that the entrance or exit of any person from any saloon during the hours specified that same should be closed should be *prima facie* evidence of its violation is invalid, as an attempt to legislate on the weight and effect of evidence.

6. Where the invalid provisions of an ordinance can be eliminated without affecting the remainder, it will not be invalid in toto.

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7. In an action for the penalty for violating an ordinance requiring the closing of saloons, an answer controverting the validity of the ordinance because it had not been published as required by Kentucky Statutes, section 3045, may be filed, and the question of fact investigated.
8. Under Kentucky Statutes, section 3063, providing that the general council shall cause all ordinances passed by them to be fairly recorded in the journal of proceedings, an answer in an action for the penalty for violating an ordinance averring that the ordinance was not recorded in the journal on the days it passed the respective houses is insufficient, as it does not aver that the proceedings of the board were not recorded at all.

THOS. E. MOSS, ATTORNEY FOR APPELLANTS.

This action was begun in the court below on an *ex parte* petition filed by F. P. Toof and others to test the validity of an ordinance of the city of Paducah.

James McNulty and Chas. Graham, who are saloonkeepers in said city, asked leave to be made parties, as the ordinances had been attempted to be enforced in the police court of Paducah against them, and they were made parties by leave of court and filed a general demurrer to the petition, and four days later the court rendered a judgment overruling their demurrer, and they then tendered an answer which the court refused to allow filed.

We contend the court erred, first, in holding the said ordinance, or any part thereof, valid; and, second, in refusing to allow answer to be filed.

The answer shows that the ordinance in question was never recorded in the journal of the proceedings of the general council as required by sections 3045 and 3063, Kentucky Statutes, which are parts of the charter of cities of the second class, and which fact would have been clearly established by the proof.

The answer also alleged that the ordinance had never been published in any daily newspaper, as required by said section 3045.

We contend that the ordinance is invalid for two reasons: 1. Because in violation of section 3059, Kentucky Statutes, which provides that "no ordinances shall embrace more than one subject and that shall be expressed in the title;" and (2) Because in its provisions it is oppressive, partial, and unreasonable.

The title to the ordinance embraces two subjects, which are not related, and have no logical connection one with the other. The provisions in the title which forbid the selling or giving away liquors between certain hours, and those which provide for the removal of all obstructions to an interior view for certain days

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have no sort of connection whatever, and surely embrace more than one legislative subject.

Where at first blush an ordinance strikes the judicial mind as being unfair, unreasonable, and oppressive, the court should not hesitate to hold it a nullity.

AUTHORITIES CITED.

City of Covington v. Ludlow, 1 Met., 295; Kentucky Statutes, sections 3045, 3063; City of Louisville v. McKegney, 7 Bush, 651; Dillon Mun. Cor. Vol, 1, sec. 331; Black Con. Law, p. 288; Hinds v. Rice, 10 Bush, 528; Kniper v. City of Louisville, 7 Bush, 603; Simrall v. City of Covington, 12 Rep., 404; Anderson v. City of Wellington, 40 Kan., 173; People v. Armstrong, 16 Am. St. Rep., 574;; Phillips v. Denver, 41 Am. St. Rep., 230; Steffy v. Monroe City, 41 Am. St. Reps., 436; Gastineau v. Commonwealth, 22d Rep., 157; Heckinger v. City of Maysville, 22d Rep., 487; State v. Webber, 22d Am. St. Reps., 920.

REED & BERRY, ATTORNEYS FOR APPELLEE.

No constitutional question is involved in this appeal, as we understand it, but the only question is, whether the ordinance conforms to that provision of section 3059, which reads as follows: "No ordinance shall embrace more than one subject and that shall be expressed in the title."

We insist that the title of the ordinance does not embrace but one subject, and that might well have been expressed in the following language: "An ordinance to regulate, or further regulate, the sale of spirituous, vinous and malt liquors in the city of Paducah."

The title to this ordinance is unnecessarily extended, but still it relates to only the regulation of the sale of liquors in the city of Paducah.

If it be conceded, which we do not, that sections 4 and 5 thereof are an unreasonable exercise of police power, and that the ordinance is, to that extent, invalid, yet the remaining sections being in accord with the title, are valid.

The validity of a law should always be favored by the court, and when in doubt the court should hold it valid.

The court below properly refused to allow McNulty & Graham to file their answer, because it contained nothing that the court could take cognizance of.

The contention of the appellants that the ordinance was not in force, because certain directory requirements as to spreading same on the record and its publication, could not be raised in this case.

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AUTHORITIES CITED.

Allen v. Hall, 14 Bush, 85; Phillips v. Covington Bridge Co., 2 Met., 222; Gale, &c., v. Owen County, 83 Ky., 61; Hines v. Rice, 10 Bush, 528; Lafferty, &c., v. Huffin, &c., 99 Ky., 82.

OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

This proceeding and appeal involves the validity of the following ordinance, passed by the general council of the city of Paducah, a city of the second class:

"An ordinance prohibiting the selling, dispensing or giving away of any spirituous, vinous or malt liquors, between the hours of 10:30 o'clock p. m. and 5 o'clock a. m.; closing saloons, coffee houses and like places of business during said hours; providing for the removal of obstructions to an interior view from the exterior and front of any building occupied by a saloon, coffee house or like business or calling, on certain days and certain hours, and prescribing penalties for violation of its provisions.

"Be it ordained by the General Council of the City of Paducah, Ky.

"Section 1. That it shall be unlawful for any saloon, coffee house or other place where spirituous, vinous or malt liquors are sold by the drink in the city of Paducah, to sell, offer for sale or give away either or any of said liquors between the hours of 10:30 p. m. and 5 o'clock a. m.

"Sec. 2. That each and every saloon, coffee house or other place where spirituous, vinous or malt liquors are sold by the drink, in the city of Paducah, shall be tightly closed, front, side and rear, at 10:30 o'clock p. m. and the same shall not be reopened until 5 o'clock a. m. the succeeding morning, and the entrance to or exit from any saloon, coffee house or other place where spirituous, vinous or malt liquors are sold by the drink in the city of Paducah by any person or persons during the time herein specified that

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same shall be closed shall be held as *prima facie* evidence of a violation of this section.

"Sec. 3. That whereas the police of the city are deterred by the regulations governing the police department from entering the saloons, each and every saloon, coffee house or other place where spirituous, vinous or malt liquors are sold by the drink in the city of Paducah, shall in the front doors and front partitions of same, hoist all blinds, open all screens, remove stained glass or frosted windows, and remove boxes or merchandise, and any other matter or thing which may obstruct the view of the interior of such place from the front of thereof on all days now fixed by the State law that these places shall be closed, and between the hours of 10:30 p. m. and 5 o'clock a. m. as provided for closed hours in the preceding section.

"Sec. 4. That it shall be unlawful for any druggist, grocery-man, wholesale liquor dealer, or other person, to dispense, sell or give away any spirituous, vinous or malt liquors between the hours of 10:30 o'clock p. m. and 5 o'clock a. m.

"Sec. 5. That for the violation of any of the provisions of any of the foregoing sections, the offender, upon conviction of the first offense, shall be fined any amount not less than ten dollars ($10.00) nor more than fifteen dollars ($15.00); upon the conviction of the second offense, the offender shall be fined in any amount not less than fifty dollars ($50.00) nor more than sixty dollars ($60.00); upon conviction of the third offense, the offender shall be fined in any amount not less than seventy-five dollars ($75.00) nor more than one hundred dollars ($100.00), and in addition thereto the license to sell spirituous, vinous or malt liquors, in the city of Paducah, issued to such offending person, or firm, shall be forfeited.

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"Sec. 6. That all ordinances, or parts of ordinances, conflicting with any of the provisions of this ordinance, are to the extent of such confliction, hereby repealed, and this ordinance shall take effect from and after its passage and approval.

"Adopted by the Council, Nov. 17th, 1902.

"Chas. Reed, Prest.

"Adopted by the Board of Aldermen, Dec. 4th, 1902.

"Chas. Q. C. Leigh, Prest.

"Approved Dec. 19th, 1902. D. A. Yeiser, Mayor."

The first objection to the ordinance is, it is claimed, that its title embraces more than one subject, and is therefore repugnant to section 3059 of the statutes, namely: "No ordinance shall embrace more than one subject, and that shall be expressed in the title." The court is of the opinion that the fact that the subject-matter is detailed in the title more minutely than is necessary does not invalidate the ordinance. Allen v. Hall, 14 Bush, 85. What this title really means, and the sum of it is, that the ordinance is one "to further regulate the sale of spirituous, vinous and malt liquors in the city of Paducah." The main objection to the provisions of this ordinance is, it is argued, that it is an improper exercise of the police power of the State. Among the powers conferred upon the municipalities of cities of the second class is that (subsection 10, section 3058, Kentucky Statutes): "To restrain, regulate and prohibit the selling or giving away of any spirituous, vinous or malt liquors, by any person within the city other than those duly licensed; to forbid and punish the selling or giving away of any spirituous, vinous or malt liquor to any woman, minor or habitual drunkard." Subsection 23, section 3058: "To impose, enforce and collect fines, forfeitures and penalties for the breach of any provision of this act or any ordin-

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ance. . . ." Subsection 25, section 3058: "To pass all such ordinances, not inconsistent with the provisions of this act, or the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce same by fines and penalties; and any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon this general power." The State has a right to determine what employments or business shall be permitted, and to forbid those which are deemed prejudicial to the public good. Under this right it forbids the keeping of gambling houses and other places where games of chance or skill are played for money, the keeping for sale of indecent books and pictures, and the keeping of houses of prostitution and the resort thereto, and in some States the sale of intoxicating drinks as a beverage. These several kinds of business have a tendency which is injurious and demoralizing; and this tendency is recognized even in States where they are not forbidden, and they are subjected to regulations with a view to reducing their evils to a minimum." Cooley's Constitutional Limitations, 743. Under this general power of the State to regulate the traffic in such articles and such employments as are deemed to be deleterious to the public peace, welfare or morals, there has been delegated expressly to the municipality, of which Paducah is one of the class, the power to likewise regulate the same within its borders. The keeping open of saloons and resorts where intoxicating liquors are sold as a beverage, or where tippling is indulged between the hours of 10:30 at night and 5 o'clock in the morning, is a matter that may be regulated by the municipality under the grant of the police power above conferred upon it by the State. Nor is it an unreasonable regulation, or beyond the fair

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exercise of this power, for the municipality to require not only that these places should be closed between the hours mentioned, but that at such times as they are by the laws of the State or the ordinances of the municipality required to be closed the operators shall in the front door and front partitions of their business houses hoist all blinds, open all screens, remove stained glass or frosted windows, and remove such obstacles as may obstruct the view of the interior from the front thereof. Under a statute conferring substantially the same powers upon cities of the fourth class regarding the restraining and punishing of vagrants and prostitutes and whoremongers, it was held by this court (Dunn v. Com., 105 Ky., 834, 20 R., 1649, 49 S. W., 813, 43 L. R. A., 701, 88 Am. St. Rep., 344) that it was a fair exercise of the police power to prohibit prostitutes from being found on the streets between the hours of 7 o'clock p. m. and 4 o'clock a. m., except in instances of reasonable necessity.

Concerning the inhibition of a druggist dispensing spirituous, vinous or malt liquors between the hours of 10:30 p. m. and 5 o'clock a. m., we are of opinion that the ordinance is invalid. The druggist is not permitted to dispense or sell spirituous, vinous or malt liquors at any time by the drink or as a beverage. It must be disposed of only as a medicine, and generally upon prescription. It may be important, and, indeed, necessary, that this right of the druggist to lawfully dispose of this ware at any time of the day or night should be unrestricted by such interference. Nor is it a reasonable exercise of the police power of the State to prohibit wholesalers of liquors from moving or disposing of their wares at wholesale, not to be drunk on the premises or adjacent premises, at any hour that may best suit the convenience of the parties.

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We are also of the opinion that, while the State might, by statute, make the fact that persons during the time when the keeping open of saloons and such places is prohibited are seen to enter or leave them *prima facie* evidence of the violation of the act (Piqua v. Zimmerlin, 35 Ohio St., 507), we are unable to find where the State has delegated to the municipality the right to legislate upon the question of evidence, and of its weight and effect before the courts. The provision in the ordinance making such fact *prima facie* evidence of the violation of the act is invalid. In other respects, except the three specifically mentioned, the court is of opinion that the ordinance is not violative of any term of the Constitution or statute law of this State. As the objectionable features may be eliminated without affecting the remainder of the ordinance, it will not be held invalid in other respects because of their presence.

Appellants McNulty and Graham, saloon keepers, tendered and offered to file an answer controverting the validity of the ordinance upon the ground that it had not been published as required by section 3045, Kentucky Statutes, which requires such publication before an ordinance shall be in force. If the publication has not been made in fact as required by the statute, then the ordinance would not be enforced. The answer should have been permitted to be filed, and the question of fact that it presented investigated. However, there is no limitation as to when the ordinance should be published. We are of opinion that it would become effective from the time that it was or shall be published as provided in that section.

A further complaint is made in the answer of McNulty and Graham that the ordinance "was never recorded into the journal of the proceedings of the board of council of

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date November 17, 1902, or November 3, 1902, nor was it recorded in the journal of proceedings of the board of aldermen on November 20, 1902, or December 4, 1902." Those were the dates at which the ordinance had its first and second readings, respectively, and was put upon its passage in the two houses of the city council. Section 3045, Kentucky Statutes, also provides "each board shall keep a correct journal of its proceedings," and section 3063: "The general council shall cause all ordinances, resolutions and by-laws passed by them to be fairly recorded in the journal of proceedings. After the adjournment of any session of either house, all of the original ordinances and all resolutions which may have become laws thereat shall be filed with the auditor, who shall record the same in well-bound books provided for the purpose by the city: provided, that no ordinance shall be recorded until it shall have become a law." The averment of the answer upon this subject is merely that the ordinance was not recorded in the journal on the days at which it is said to have been passed by the respective houses of the council. It is not averred that the proceedings of the board were not recorded upon the journals of the two bodies at all. We are of opinion that, if the proceedings were enrolled upon the journals, and thereafter approved by the bodies whose action they represented, and signed by their respective presiding officers, the requirements of the section would have been complied with.

The judgment is reversed, and this cause remanded, with directions for proceedings consistent herewith.

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CASE 17—ACTION BY THE COMMONWEALTH AGAINST TERRY MCGOVERN TO PREVENT A PRIZE-FIGHT IN THIS STATE.—JUNE 20.

Commonwealth v. McGovern.

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APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

FROM A JUDGMENT DISMISSING THE PETITION THE COMMONWEALTH APPEALS. REVERSED.

PRIZE-FIGHTING—EQUAL DIVISION OF REWARD—USE OF GLOVES—EFFECT—EQUITY—POWER TO ENJOIN.

Held: 1. Evidence examined, and *held* to show that a fight advertised to take place between certain persons would, if permitted, constitute a prize-fight.

2. The fact that the reward is to be equally divided between the combatants in a prize-fight does not legalize the transaction.

3. The use of gloves by combatants in a prize-fight will not make the contest any less a violation of the statute.

4. Kentucky Statutes, 1899, section 1289, which provides that it shall be the duty of "all judges of courts . . . on being informed . . . that such a fight (prize-fight) is about to take place . . . to suppress and prevent the same, and . . . in order to suppress or prevent the same they shall exercise all the powers vested in them for the prevention of crimes," authorizes a court of equity, in a suit by the Commonwealth, to enjoin one from permitting the holding of a prize-fight on his premises, on the ground that such a use of his property will constitute a public nuisance, though it can not grant an injunction against the principals in the contemplated prize-fight, nor those connected with them as managers, trainers, &c., because the process of the criminal courts is adequate to prevent the fight by the arrest and prosecution of the parties concerned.

C. J. PRATT, ATTORNEY GENERAL, BENNETT H. YOUNG, H. L. STONE, D. W. FAIRLEIGH AND HELM BRUCE, FOR APPELLANT.

STATEMENT.

The judgment appealed from was rendered in a suit brought by the Commonwealth of Kentucky on relation of the Attorney General against Terry McGovern and others to restrain the holding—pulling off—of a prize-fight in the city of Louisville. The principals, and their managers, and the owner of the play house

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in which it was proposed to hold the fight as a public exhibition of law-breaking, were made parties defendant to the suit.

Terry McGovern and Young Corbett were to be the fighters, and at the time the suit was filed they were in training at Cincinnati, Ohio. This was a precautionary measure, for it was feared that if they should spend several weeks in Kentucky just before the fight was to be pulled off, in preparatory training, they might be disturbed in some way, for what they were preparing to do was publicly and for a large reward, to break the laws of Kentucky. Wherefore it was thought to be wiser to put their feet upon the soil of the State they intended to disgrace the shortest possible time before the actual commission of the crime.

Terry McGovern and Young Corbett are professional prize-fighters. Robert Gray is a promoter of prize-fights in Louisville, and he is a resident of that city. To propagate and encourage the delusion that the bouts which occur are not prize-fights but exhibitions of the manly art of boxing he does not use his own name in any of the transactions connected with these affairs which come under the notice of the general public. And so it is that these bouts are given under the *auspices* of the "Southern Athletic Club." Robert Gray is the Southern Athletic Club. There is no one else connected with it. He is the whole of it. That is his trade name. This business is one of his trades. Wm. F. Norton owns and operates a large theater, the largest in the city, known as the Auditorium. The fight was to be given at that place. It was not to be the first fight held there. It was to be the fourteenth in the series since the 1st day of December, 1900, under the auspices of the Southern Athletic Club.

The proposed fight was widely advertised. Spectators from almost every State in the Union were expected to be present. The fight, as the ticket stated, was for the feather-weight championship of the world. It was to be a great attraction. The price of the seats near the stage was $20 each, further away $15 each, and remote seats $10 each, and the remotest $5 each. Gallery seats were $3 each. The attendance was expected to be not less than four thousand. Thus a large sum of money for seats alone was to be received by the Southern Athletic Club—Robert Gray—and the Auditorium—Wm. F. Norton. The fighters were to receive ten thousand dollars between them.

It was common knowledge that the mayor of the city regarded the proposed fight as an encouragable public exhibition, and that no sort of effort would be made by the city authorities to prevent it. The amended petition alleges this; and the evidence, affidavit of W. R. Belknap (read as a deposition), proves it.

In this situation the Governor of the State was appealed to and

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he addressed a letter to the Attorney General, in effect directing him to take such necessary steps as were warranted by law.

The Attorney General, upon a careful consideration of all the conditions, filed this suit in equity in the Jefferson Circuit Court seeking an injunction restraining the holding of the fight.

A preliminary injunction was granted by Judge Field after a full argument. Numerous depositions and affidavits were read upon the hearing of the motion for a preliminary injunction. The moment the preliminary injunction was granted, notice was given that on the next day an application would be made before Judge Guffy to dissolve it. Accordingly, the next day the application was made, the original record being brought up by the circuit clerk because there was not time to make a transcript. Judge Guffy transferred the motion to Judge White, and the whole court sat upon the hearing. After a lengthy argument, Judge White delivered the following written announcement:

"This motion was made before the chief justice, who, by consent of the applicants, transferred the hearing of the motion to Judge White, who invited the whole court, except Judge Paynter (absent), to hear the application with him. The majority of the court who heard the application to dissolve the injunction of Judge Field are of the opinion that the contest which has been enjoined is a prize-fight, and that it is not material whether the victor in the contest is to receive more of the reward offered than the vanquished.

"The court is divided equally upon the question of whether the chancellor has preventive power under the Kentucky Statutes to restrain the holding of such a contest, Chief Justice Guffy and Judges White and Burnam holding the negative, and Judges DuRelle, Hobson and O'Rear holding the affirmative. The motion to dissolve is therefore denied."

Because of this preliminary injunction the fight was not held as planned. The fighters departed from Cincinnati. Their backers and the attending rooters left Louisville. The Southern Athletic Club and the Auditorium remained. The injunction stood as a menace to their business. The single fight had been prevented, a single one in a continuous series of fourteen. The future business must be looked after. They are not interested academically in the settlement of a disputed law point. Questions of law practice have no concern for them. What they are concerned about is the future of the business. It is a fabulously lucrative one. Four thousand seats at from $20 to $5 a seat for a single evening is an attractive proposition. It is of the last importance to lay the chancellor out of sight for the future. The case, therefore, was promptly pressed to a final hearing. It was

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assigned to Judge Toney, and he rendered the final judgment. The petition was dismissed absolutely, and the Commonwealth prosecutes this appeal.

The record before Judge Toney was precisely the same as that before Judge Field and before Judge White and his associates, for it was agreed that the affidavits read on the hearing of the motion for a preliminary injunction should be read as depositions on the final hearing.

THE STATUTE.

1. There is a statute in Kentucky prohibiting prize-fighting and providing that it is felony to engage in a prize-fight, a high misdemeanor, subjecting the offender to fine and imprisonment, to aid or abet in bringing on a prize-fight, a misdemeanor to bet on or voluntarily witness a prize-fight, and a misdemeanor for any one to permit the use of his lands for a prize-fight. In addition, all judges of courts and other named officers are expressly charged to exercise all their powers for the prevention of the crime.

The statute is as follows:

"Section 1284. If any person shall engage in a prize-fight, or a fight for a bet, wager or stakes, by whatever name it may be called, he shall be fined one thousand dollars and imprisoned in the county jail six months.

"Section 1285. If any person or persons shall be a second or seconds in such a fight, or bear a challenge, or the acceptance of a challenge, either verbal or written, for such fight, or make up or aid in making up, the stakes for such fight, or shall, in any capacity, or in any way, aid or assist in bringing on or conducting such fight, he or they shall be fined five hundred dollars and imprisoned in the county jail three months.

"Section 1286. If any person shall bet, or lay any wager on any such fight, in or out of this State, or be present at any such fight in this State, as a voluntary spectator thereof, he shall be fined one hundred dollars.

"Section 1287. If any person owning or occupying or having control of land, shall voluntarily permit the use of the same for any such fight, he shall be fined five hundred dollars and imprisoned in the county jail three months.

"Section 1288. If any person shall train or prepare, or assist another in training or preparing for such a fight in this or any other State, he shall be fined five hundred dollars, and imprisoned in the county jail three months.

"Section 1289. It shall be the duty of *all judges of courts*, justices of the peace, mayors of cities, trustees of towns, and

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other conservators of the peace, all sheriffs, constables, marshals, and other police officers, on being informed, or having reason of their own knowledge to believe, that such a fight is about to take place, or that there is training or preparation in any place within their jurisdiction for such fight, to suppress and prevent the same; and for this purpose they shall arrest the offending parties, or have them arrested, or hold them to security for their good behavior, and also commit them to prison, if they do not give bail for their appearance at the next circuit court to answer the charge; *and in order to suppress and prevent the same they shall exercise all the powers vested in them for the prevention of crimes and misdemeanors;* and any officer having such knowledge or information, who shall willfully neglect or fail to execute the duties required of him in this section, shall be fined the sum of five hundred dollars, and shall forfeit his office."

ARGUMENT AND AUTHORITIES.

The contest was to be a prize-fight. It is argued that the particular *exhibition* which was proposed to be given was not to be a *prize-fight* within the meaning of the statute; and this is contended upon two grounds, viz.: (a) That it was merely a "boxing match" for "points," and was not, therefore, to be a fight; (b) that the reward was to be equally divided between the combatants, and therefore there was no *prize* to be fought for.

A. The Supreme Court of Ohio, in the case of Seville v. State, 49 Ohio State, 117: 30 N. E. R., 624, used what seems to us very sensible language in stating the question to be determined in such a case. It said:

"The question for the jury to decide was whether this combat was a prize-fight, not what the Queensbury rules or any other rules call it, nor what name those accustomed to such combats have given it. What was it in plain language? And this question of fact, under a proper instruction from the court as to what constitutes a prize-fight, the jury was as competent to decide as the most experienced boxer or prize-fighter. The question was not one of skill or science, to be decided upon the opinions of those experienced in such practices, or by rules adopted for the government of associations of such persons; but one within the comprehension of the common understanding and the range of common knowledge."

B. But it is said this is not to be a prize-fight, because the reward was to be *equally divided* between the combatants. The amount to be received by them was $10,000, and it is claimed that this sum was to be equally divided between them. What possible difference would that fact make, if it were a fact? To

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say that the statute covers only the case where the reward is unequally divided would be to say that the statute does not prohibit the brutal and debauching public exhibition, but does prohibit a greater reward being given to one than to the other combatant; that the act was passed to prevent *discrimination* between the victor and the victim; that it was passed out of tender regard for the vanquished in order to see that he should not lose both the fight and the money.

1. Remedy by Injunction. Neither much debate nor much research is necessary in order to reach the conclusion that, aside from statutory law, the chancellor has no power by injunction to prevent the commission of a crime *as crime*. That is to say, he may not, because a given act is criminal, *therefore* enjoin the doing of it. This is the rule, according to the common understanding of the bench and bar. But, upon the other hand, the power of the chancellor to enjoin the commission of a given act is in no way diminished by the fact that the commission of the act is criminal. No paralysis of the chancellor's arm is produced by that fact.

Undoubtedly the chancellor has in general the power to restrain public nuisances at the suit of the Attorney General. This is an ancient power of the chancellor and seems to be traceable as far back as the reign of Queen Elizabeth. Speaking of this jurisdiction, Judge Story says:

"In regard to public nuisances the jurisdiction of courts of equity seems to be of a very ancient date; and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable, not only to public nuisances, strictly so-called, but also to purprestures upon public rights and property." (2 Story's Equity, sec. 921.)

It is well here to note that Judge Story relates the jurisdiction primarily to public nuisances, strictly so-called, where public property rights are not involved.

Now the statute against prize-fighting was enacted to prevent and suppress a great public nuisance—a brutalizing and debauching public exhibition. That such an exhibition is a *public nuisance* ought not to be doubted by any one.

In Wood on Nuisances, 3d edition, section 68, the author says:

"A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society is a public nuisance. Under this head are included all puppet-shows, legerdemain, and obscene pictures, and all exhibitions, the natural tendency of which is to pander to vicious tastes, and to draw together the vicious and dissolute members of society."

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That a prize-fight is an exhibition of the character here described, and, therefore, a public nuisance, is the consensus of opinion of the civilization of the twentieth century, as shown in many judicial opinions and the legislative enactments of nearly all the States of the Union. And the courts, some of whose language we have quoted, but here repeat, have been uniform in explaining the purpose and motive of such statutes.

Thus, in Sullivan v. State of Mississippi, 67 Miss., 352, the Supreme Court of Mississippi said of the statute in that State:

"We think, however, that the evil sought to be protected against by the statute is the debasing and brutalizing practice of fighting in public places, or places to which the public, or some part of it, is admitted as spectators."

So in State v. Purtell, 56 Kan., 482, the Supreme Court of Kansas, in speaking of the statute of that State, said:

"The evil designed to be remedied by the statute is that class of brutal exhibitions for giving which considerable sums of money were paid, and we do not think the statute can be evaded by rewarding the unsuccessful as well as the successful combatant."

2. But, wholly aside from the broad provision of the statute, we submit that a court of chancery has ample power to prevent by injunction, at the suit of the State, a debauching exhibition of this character, which is essentially and in every aspect a public nuisance. The ground of the jurisdiction is that the chancellor has power by injunction to prevent a *public nuisance*. This power is supported by abundant and conclusive authority.

3. Having argued the power of the chancellor under the statute, and his power aside from the statute, we wish now briefly to submit that a conjoint consideration of the statute and of the general powers of the chancellor leaves no possible doubt of the power of the chancellor to issue the injunction, and of his absolute duty to do so upon proper information.

After providing in section 1284 that the principals in a prize-fight shall be deemed guilty of a felony and be confined in the penitentiary, and after providing in section 1285 that the seconds and all those who assist in getting up the fight or conducting it shall be fined and imprisoned, and after providing in section 1286 that any person who shall be a voluntary spectator of such a fight shall be fined the sum of $100; and after providing in section 1287 that if any person owning or controlling land shall voluntarily permit it to be used for such a fight he shall be fined $500 and imprisoned in the county jail three months; and after providing in section 1281 that any person who shall assist another in preparing for such a fight shall be fined $500 and imprisoned

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in jail three months, section 1289 of the Kentucky Statutes then provides as follows:

"1289. *Duty of officers to prevent.* It shall be the duty of *all judges of courts*, justices of the peace, mayors of cities, trustees of towns, and conservators of the peace, all sheriffs, constables, marshals and other police officers, on being informed, or having reason of their own knowledge to believe that such a fight is about to take place, or that there is training or preparation in any place within their jurisdiction for such fight, to *suppress and prevent* the same; and for this purpose they shall arrest the offending parties, or have them arrested, or hold them to security for their good behavior, and also commit them to prison if they do not give bail for their appearance at the next circuit court to answer the charges; and *in order to suppress and prevent* the same they shall *exercise all the powers vested in them for the prevention of crimes and misdemeanors;* and any officer having such knowledge or information, who shall wilfully neglect or fail to execute the duty required of him in this section, shall be fined the sum of $500, and shall forfeit his office."

It is argued by counsel for the appellees that this section of the statute absolutely takes away from the chancellor any power which he otherwise would have had to enjoin a public nuisance, because, say counsel, prize-fighting is here made a felony by this statute which at the same time provides a remedy for its suppression, to-wit, to arrest the offender and require him either to give bond or go to jail; and they argue that where a statute creates a new offense and provides a remedy for its punishment this remedy is exclusive.

Without entering upon any discussion as to the principle of statutory construction which counsel seek to invoke, where a statute creates a new offense or a new right and provides a method for its vindication, it is an all-sufficient answer to the contention here made by counsel to say that they read *only part* of this section, or rather refer to *only part* of the section, and treat it as if it contained no language except that which directs the arrest of the offender and his imprisonment in case of failure to give bail. When the whole section is read it will be seen that so far from confining the remedy to the arrest and imprisonment of the offender, as the means of preventing the perpetration of the act, it, on the contrary, goes *beyond* this and in most emphatic terms commands every officer of the law to exercise *all the powers* he has to suppress and prevent the offense.

Let us analyze the section. Your Honors will observe that in the first clause of the section, reading down to the first semi-

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colon, is a general mandate that it shall be the duty of *all judges of courts*, justices of the peace, etc., on being informed or having reason to believe that such a fight is about to take place, "to suppress and prevent the same." Thus far we have simply a declaration as to the duty of these various officers of the law. Then, in the next clause of the section, reading from the first semi-colon down to the second semi-colon, is the provision that for this purpose, to-wit, the purpose to suppress and prevent the fight, they shall arrest the offending parties and require them to give security for good behavior or commit them to prison. *Now counsel for defendants seem to treat this section as if it stopped here.* They treat the section as if it simply declared that it should be the duty of all the officers mentioned to suppress and prevent the fight, and as if it then simply directed them, as a means of suppression or prevention, to arrest the offenders and require them to give security for good behavior or go to jail. They treat the section as if that were all there is in it. But, fortunately for the law, and unfortunately for the law-breakers, the section, after specifically directing that the officers of the law, for the purpose of preventing the fight, shall arrest the offenders and require them to give security or go to jail, *then proceeds further* and adds this significant provision: "*And in order to suppress and prevent the same* they shall exercise *all the powers vested in them* for the prevention of crimes and misdemeanors."

In conclusion, we submit that *a prize-fight is a public nuisance;* that the *jurisdiction and power* of the chancellor to *enjoin a public nuisance*, when the exigencies of the case call for it, is a principle which has been settled for centuries and has been recognized and acted upon many times in late years; that in the particular class of cases now involved, to-wit, prize-fights, the *propriety of enjoining them has been asserted*, and they have been enjoined on four different occasions in as many different States, exclusive of the case at bar; that they have been enjoined in Indiana and Louisiana where the actions of the lower courts have been approved by the supreme courts of those two States; that they have been enjoined in Ohio and Arkansas by chancellors. In addition to these we are glad to add that the same remedy has been granted in this case by Judge Field of the Jefferson Circuit Court, and this action has been approved by at least three of the judges of this court. And on the other side of the matter we can say that no chancellor, except Judge Toney, has ever refused to grant such relief in such a case. And we find a statute in Kentucky which in peremptory terms commands every judge in the State, including in that designation every chancellor in

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the State, to *exercise every power he has* to suppress and prevent this particular offense of prize-fighting.

We respectfully ask that the judgment of the court below be reversed.

AUTHORITIES.

1. A prize-fight was contemplated. Ky. Stats., secs. 1284-1289; Seville v. State, 49 Ohio St., 117; 30 N. E. R., 624; Sullivan v. State, 67 Miss., 352; 7 Sou. R., 275; State v. Purtell, 56 Kan., 482; 43 Pac. R., 782; State v. Olympic Club, 47 La. Ann., 1093; 17 Sou. R., 600, 599.

2. Remedy by injunction. 2 Story's Equity, sec. 921; Wood on Nuisances, 3d ed., sec. 68; Ohio, ex rel., v. Hobart, Mss. Op. by Judge Hollister of Cincinnati; Cincinnati R. R. v. Commonwealth, 80 Ky., 139; Muggler v. Kansas, 123 U. S., 672; Attorney General v. Jamaica Pond Co., 133 Mass., 361; In re Debs, 158 U. S., 592; Columbian Athletic Club v. State, 143 Ind., 98; 40 N. E. R., 917; State v. Olympic Club, 47 La. Ann., 1096; 17 Sou. R., 600.

3. Neal v. Palmer, 103 Ky., 496; O'Leary v. State, 58 N. E. R. (Ind.), 703; State v. Patterson, 37 S. W. R., 478; People v. District Court, 46 L. R. A. (Col.), 850; Ex parte Sawyer, 124 U. S., 200; Fletcher v. Tuttle, 151 Ill., 41; 25 L. R. A., 143.

KOHN, BAIRD & SPINDLE, DODD & DODD AND O'NEAL & O'NEAL, FOR DEFENDANTS.

(No brief in the record for defendants, but in lieu thereof the reporter inserts the syllabus of the opinion of Judge Sterling B. Toney.)

1. A preliminary injunction is an interlocutory order, and possesses no element of finality; nor does it anticipate the final determination of the case, nor in any wise conclude the rights of the parties. It simply preserves the subject-matter and the rights of the parties in *statu quo*, until the final hearing, or until the further order of the court.

2. A court of chancery is not a court of criminal equity to purge the Commonwealth of immorality, nor to prevent the commission of crime. In the absence of a statute conferring such power, a chancellor has no jurisdiction to enjoin merely criminal or immoral acts which do not affect rights to property, or other civil or legal rights.

3. The origin, nature and jurisdiction of the common-law and equity courts of England examined and reviewed, and the distinction between the jurisdiction of the common-law courts and the equity courts pointed out: English chancellors and English courts of equity had no jurisdiction to en-

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join the commission of crime, nor acts which constituted a public nuisance, unless such acts or offense involved the invasion of the rights of property, either public or private. The remedy of the Crown was by information or indictment; the remedy of the Commonwealth is by arrest, bail and indictment.

4. Where a statute makes an act a public offense, which was not such at common law, and the same statute prescribes the mode of procedure for the prevention of its commission and the punishment thereof, only the statutory mode of procedure is permissible to prevent or punish its commission, all other modes being excluded by implication.

5. Where no property rights are involved, neither an English chancellor, nor a judge in this State sitting as a chancellor in a court of equity, has jurisdiction on bill filed by the Attorney General on behalf of the Commonwealth, or by a private suitor to enjoin the commission of any act or acts which violate the penal statutes of Kentucky.

6. Section 1289 of the Kentucky Statutes, against prize-fighting, which declares, among other things, that "all judges of courts in this Commonwealth shall exercise all the powers vested in them for the prevention of crimes and misdemeanors" to prevent a prize-fight, confers no jurisdiction or power upon said judges sitting as chancellors in courts of equity to enjoin the commission of a prize-fight; said statute confers no additional power or jurisdiction upon said judges other than such as are possessed by English chancellors: It does not authorize or empower said judges to restrain by injunction the commission of any offense against the penal laws that a common-law court of criminal jurisdiction and a jury can redress.

7. Section 1289 of the Kentucky Statutes is simply a declaratory mandatory statute requiring said judges, as conservators of the peace, to exercise all the powers vested in them by law for the prevention of crimes and misdemeanors in order to suppress and prevent the commission of the statutory offense of prize-fighting. It does not comport with the dignity of the Commonwealth to allege in a bill in equity filed by her Attorney General for an injunction to restrain the violation of the penal laws that she has no adequate remedy to prevent the same.

8. When the Commonwealth of Kentucky appears before one of her own judicial tribunals as plaintiff, she appears not in her sovereign capacity, but as any other litigant or suitor, and can invoke only such powers and jurisdiction as she has by her Constitution and laws conferred upon the court before which she has instituted her action: She can not demand that the

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writ of injunction at her instance shall be made to usurp and take the place of the orderly processes of the criminal law which her Constitution and her Legislature have provided for the prevention and punishment of acts in violation of her penal laws.

OPINION OF THE COURT BY JUDGE SETTLE—REVERSING.

This equitable action was instituted in the Jefferson circuit court, common pleas division, by the appellant, the Commonwealth of Kentucky, on relation of the Attorney General, against the appellees, Terry McGovern and others, to prevent the holding of a prize fight advertised to take place on the 22d day of September, 1902, in the Auditorium, a large theatre situated in the city of Louisville. Terry McGovern and Young Corbett were to be the combatants, and their managers and the owner of the Auditorium were made parties to the action.

It is averred in the petition, in substance, that the prize-fight was to be given under the auspices of the Southern Athletic Culb of which the appellee Robert Gray is the sole stockholder and manager; that the Auditorium has a seating capacity of 4,000, and that the prices of tickets for admission into that building to witness the prize-fight vary from $5 to $20 a seat; that the fight was to take place according to the Marquis of Queensbury rules, and the fighters were to receive $10,000 between them. It is further averred that the prize-fight, if allowed to take place, would bring to the city of Louisville a great number of sporting men, disorderly persons, and criminals, and that the persons so drawn to the city would constitute a lawless, turbulent and dangerous assembly of many thousands of people, and would produce breaches of the peace and other violations of the law, which would have a demoralizing effect upon the good order and well-being of the community, and

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produce a public nuisance. It is also averred that a criminal prosecution of the principals and others connected with them would not prevent the great injury that would be done to the people of the State by holding the prize-fight within its bounds, and, finally, that the Commonwealth has no adequate remedy at law for the injury which would result to the public welfare, if the prize-fight were allowed to be held. Answer was filed by the appellees, traversing the allegations of the petition.

Thereafter, upon the pleadings and proof, in the form of affidavits and depositions, the judge of the court in which the action was then pending issued a temporary injunction as prayed, and upon the day following its issual a motion was made by the appellees before one of the judges of this court to dissolve the same, and that judge and five of his associates, members of this court whom he called in consultation, rendered the following opinion:

"This motion was made before the Chief Justice, who by consent of the applicants transferred the hearing of the motion to Judge White, who invited the whole court, except Judge Paynter (absent) to hear the application with him. The majority of the court who heard the application to dissolve the injunction of Judge Field are of the opinion that the contest which has been enjoined is a prize-fight, and that it is not material whether the victor in the contest is to receive more of the reward offered than the vanquished. The court is divided equally upon the question of whether the chancellor has preventive power under the Kentucky Statutes to restrain the holding of such contest; Chief Justice Guffy and Judges White and Burnam holding in the negative, and Judges DuRelle, Hobson and O'Rear holding the affirmative. The motion to dissolve is therefore denied."

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After the foregoing action by this court, the case was submitted upon the pleadings and proof to the judge of the chancery division, No. 2, Jefferson circuit court, for trial, who rendered judgment dismissing the petition. Appellant complains of that judgment, and has brought the case by appeal to this court for review.

No one can doubt that the contest between appellees McGovern and Corbett, if it had taken place as advertised, would have been a fight. Indeed, it is clear from the evidence furnished by the record that they are prize-fighters and that the fight was to be one of unusual endurance and extreme brutality, a very feast of blood, to be enjoyed to the full by the thousands who were expected to witness it. From the mass of testimony in regard to the bloody character of such contests found in the record we have but to mention the following:

Lambertson, the sporting editor of a Cincinnati newspaper, in describing a fight of this kind which he witnessed at the Auditorium, said it appeared to him the men were "hitting each other just as hard as they could."

Harris, the manager of McGovern, in speaking of his manner of fighting, says: "There is 'no make-believe' about it; that, when he goes into a contest of this kind, he 'goes in to win;' that he strikes 'just as hard as he can,' and that this is the way with every such contest, unless it is a 'fake.'"

Gearhart, a professor of boxing in the city of Louisville, testified that he had seen a great many contests under the Marquis of Queensbury rules, and that they are brutal; and, upon being asked if it was customary for the contestants to try to knock each other out in such contests, he said: "The contestants do generally, if they are fighting under the Marquis of Queensbury rules, endeavor to knock each

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other out, because, if they succeed in doing that (that is, in knocking their opponent down, so that he is unable to get on his feet in ten seconds), in that way they will get the decision. Hence, they always endeavor to do that, if they are 'fighting on the square,' in sporting parlance." Upon being further asked if the sports would regard it a square contest if the opponents did not use their best endeavor to knock each other out, he answered: "No, that would be considered a 'fake.'"

A physician, Dr. Gossett, testified to having professionally attended a man named Handler, after his fight with Bill Harrahan at the Auditorium in November, 1901, and of his condition said: "His upper lip was cut in two places—one side clear through to the teeth, completely severed, and the other side was nearly through. His upper lip was swollen about three or four times its normal thickness, and one eye was completely closed and swollen very much. Both lids were swollen about an inch in thickness, due to the extravasation of blood. He could not open one of his eyes. The other was very nearly as bad. He had a cut over one eye, about an inch and a half in length, in which we had to take three or four sutures. We took six or eight sutures in his lip. His face was very much bruised; looked like a piece of raw beef. Blood was oozing from different parts of it. . . . When I first saw him, the feeling I had was of sickening disgust."

Another witness, Mr. Lewis Humphrey, testified that he saw the fight between Ryan and West for the championship of the middle-weights of the United States, which occurred in the Auditorium in the city of Louisville on March 4, 1901. They fought with five-ounce gloves and under the Marquis of Queensbury rules. The fight was under the auspices of the Southern Athletic Club, of which the appellee

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Robert C. Gray was then, as now, the manager, and some of the city police were present. The fight is thus graphically described by the witness: "I saw this fight from beginning to end, being very close up to the ring, where I could very distinctly see both contestants during the whole fight. They were dressed in the manner which is universally customary with prize-fighters, being stripped to the waist. They started into the fight in the usual manner, by shaking hands in the center of the ring, and then began to fight each other with their fists, using and manifestly exerting all of their physical strength in the blows delivered against each other. It was an extremely vicious fight, and the physical punishment of each of the contestants was very great. West was the greatest sufferer. His nose was split early in the fight, so it hung in two portions. Midway in the contest he was so covered with blood that above the waist it was difficult to see the white skin. The gloves on the hands of his opponent, Ryan, became fairly soggy with blood from striking the face of West. West showed the greatest endurance, and, although at least half a dozen times it appeared as if he would faint, he remained in the ring until the close of the seventeenth round. During this time, he was several times knocked to the floor, and barely managed to rise before the count of ten. At the end of the seventeenth round, he took a seat in the corner, and was in such a dazed and weakened condition, that, after consultation with his seconds, the referee declared him unable to go further, and awarded the fight to Ryan. During the fight Ryan resorted to what is known as 'chopping tactics,' and cut and bruised West in innumerable places about the entire face and head; also striking him in the body, raising very perceptible bruises. Ryan was himself badly cut about the face, and one of his eyebrows split. He bled very

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freely, and the attention of his seconds between the rounds was almost entirely taken up with removing the blood from his face and body. A large quantity of blood covered the floor on which they were fighting, making it at several places very slippery."

The combats described by the witnesses were conducted according to the Marquis of Queensbury rules. It is admitted that the prize-fight, to prevent which the injunction in this case was sought, was to be fought under the same rules. A copy of these rules is made a part of the record in this case, and we here quote from that copy the following:

"Sixth. When the contestant has fallen to the ring floor through the medium of a blow or weakness, he must arise, unassisted, within a period of ten seconds. His opponent must meanwhile retire to his corner, and not resume fighting until the fallen man has regained his feet. Should the latter fail to recommence the battle within the specified ten seconds, the referee shall award the victory to the other contestant. When a contestant is on the floor, the count shall be made by the official timer of the club, either from an electric clock or his watch. He shall call off each second by striking the gong.

"Seventh. A contestant, on one knee, or hanging on the ropes in a helpless condition with his toes off the floor, shall be considered down, and, if struck while in that position, must be awarded the decision by the referee."

The brutal frankness of the language contained in these rules manifests, without the aid of extrinsic evidence, the character of the fighting provided for therein, and the cruelty of the punishment that may be inflicted thereunder.

The fact that the reward in this case was to be equally divided between the combatants can not legalize the trans-

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action. As well said by counsel for appellant, to hold that the statute against prize-fighting covers only the case where the reward is unequally divided would be to say that the statute does not prohibit the brutal and debauching public exhibition, but does prohibit a greater reward being given to one than to the other combatant. It would be absurd to place such a construction upon the purpose and object of the statute, and certainly there is nothing in its language that warrants the conclusion that it was enacted to prevent discrimination between the victor and the vanquished. "The evil designed to be remedied by the statute is that class of brutal exhibitions, for giving which considerable sums of money were paid, and we do not think the statute can be evaded by rewarding the unsuccessful, as well as the successful party." State v. Purtell, 56 Kan., 483, 43 Pac., 783.

Nor will the use of gloves by the combatants in a prize-fight make such a combat any less an offense in the eyes of the law. The Supreme Court of Louisiana in the case of State v. Olympic Club, 47 La. Ann., 1095, 17 South., 599, said of such a contest as the one under consideration: "The glove contests permitted in defendant's club are advertised extensively and are generally known as 'prize-fights.' The fighters are under contract with each other, with the club, and under obligations to spectators and betters, to fight to a finish; that is, usually until there is what is called a 'knock-out.' There can be no reasonable objection to boxing as generally understood. It is a manly, healthful, and vigorous training, and encouraged in some of our most respectable institutions; and interference with it by legislative power would be a great stretch of authority, bordering upon an infringement of personal liberty. And even boxing without gloves for a display of skill and for pastime, when there is no breach of the peace, and no intentional injury to

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the person, can not be considered as embraced within the statute. But in a prize contest for a purse, with or without gloves, there is, despite the customary shaking of the hands and the preliminary courtesies between the combatants, an intention to do injury and to break the public peace. The contest is directly within the spirit, if not the exact definition, of an assault. In such a contest, there can be no absence of an intention to do an injury, for the purpose of the contest is to subdue an opponent by knocking him senseless, or so injuring him that he can not, within a given time, continue to fight."

It now remains to be seen whether a court of equity has jurisdiction to prevent by injunction a prize-fight. Kentucky Statutes (1899), sections 1284-1288, inclusive, prohibit prize-fighting, make it a felony to engage in prize-fighting, a misdemeanor to aid or abet in bringing on a prize-fight, or to bet on or voluntarily witness such a fight, and also a misdemeanor for any one to permit the use of his lands for a prize-fight.

Section 1289 provides: "It shall be the duty of all judges of courts, justices of the peace, mayors of cities, trustees of towns, and other conservators of the peace, all sheriffs, constables, marshals, and other public officers, on being informed or having reason of their own knowledge to believe that such a fight is about to take place, or that there is training or preparation in any place, within their jurisdiction, for such fight, to suppress and prevent the same, and for this purpose they shall arrest the offending parties, or have them arrested, or hold them to security for their good behavior, and also commit them to prison, if they do not give bail for their appearance at the next circuit court to answer the charge; and in order to suppress and prevent the same, they shall exercise all the powers vested in them for the prevention of crimes and misdemeanors; and any

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officer having such knowledge or information, who shall willfully neglect or fail to execute the duties required of him in this section, shall be fined in the sum of $500.00, and shall forfeit his office."

We are told by Judge Story, in his excellent work on Equity Jurisprudence (volume 2, section 921): "In regard to public nuisances, the jurisdiction of courts of equity seems to be of very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. This jurisdiction is applicable, not only to public nuisances, strictly so called, but also purprestures upon public rights and property." Again, in section 924, it is said by the same author: "The ground of this jurisdiction of courts of equity in cases of purpresture, as well as of public nuisances, undoubtedly is their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigation." Continuing the discussion, the learned writer announces further that: "The courts (of equity) can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest and abate those in progress, and by perpetual injunction protect the public against them in the future, whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury."

In Pomeroy's Equity, 3d vol., section 1349, it is said: "A court of equity has jurisdiction to restrain existing or threatened nuisances by injunction at the suit of the Attorney General in England, and at the suit of the State or

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the people, or municipality, or some proper officer representing the Commonwealth, in this country."

In 21 Am. & Eng. Ency. of Law, 703, it is likewise said: "A court of equity has discretionary jurisdiction to enjoin the creation or erection of either a public or private nuisance or a purpresture. This jurisdiction is founded upon the ability of equity to prevent irreparable mischief and vexatious litigation and to furnish a more complete remedy than can be had at law. The remedy by indictment for a public nuisance is not an adequate remedy at law, precluding the remedy by injunction; nor is the right of a private person to call upon the public authority to abate the public nuisance, after its erection, such a remedy."

In Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass., 361, an injunction was granted, to restrain the lowering of the waters of a pond, on the ground that it would be injurious to the public health. In concluding its opinion, the court said: "Indeed, it may be affirmed that in no well-considered case has the power of a court of equity to interfere by injunction in cases of public nuisances been denied; the only denial being that of a necessity for exercise of that jurisdiction under the circumstances of the particular case."

In Mugler v. Kansas, 123 U. S., 672, 8 Sup. Ct., 273, 31 L. Ed., 205, suit was brought by the State to enjoin the operation of a distillery, which was forbidden by its laws, on the ground that it was a public nuisance, injurious to the morals of the community. The court, after referring to the rule herein quoted from Story's Equity, adopted it without reservation. The same doctrine is adhered to in People v. City of St. Louis, 48 Am. Dec., 339, and Attorney General v. Railroad Cos., 35 Wis., 425.

We find by the foregoing authorities that the jurisdiction

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of courts of equity to prevent and suppress nuisances, especially such as affect the public health, morals or safety, is of ancient date, though in Kentucky this power has been somewhat restricted in its application. While the writ of injunction may not be employed to prevent the commission of crime, as such, we see no reason why it may not be resorted to to prevent the use of real property for the holding of a prize-fight. Indeed, we think the use of the injunction for this purpose is not only permissible, but required by the statute, supra, enacted to suppress that evil, if the means at the command of the criminal courts are inadequate to its suppression.

We are not inclined to believe that the language of the act, supra, "shall exercise all the powers vested in them for the prevention of crimes and misdemeanors," confers upon any of the officers named therein new powers of any kind; but it does require of all ministerial officers of the State peculiar and extraordinary alertness, activity, and zeal in the exercise of all the powers with which they are vested in the matter of preventing and suppressing prize-fights, and any willful failure of duty on their part will subject them to a fine of $500 and the forfeiture of office. The same provision of the statute requires that "all judges of courts," in the performance of the duties enumerated in the statute, "in order to suppress and prevent" prize-fights, shall exercise all the powers vested in them for the prevention of crimes and misdemeanors. It will be observed that the language, supra, not only embraces judges of courts of purely criminal jurisdiction, but also includes all judges of courts. Therefore, the command reaches judges of common-law and equity jurisdiction, and no such express command is laid by the Kentucky Statutes upon all judges with reference to any other crime or misdemeanor

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than prize-fighting. Under the statute, then, it is the duty of all the officers, both judicial and ministerial, named therein, to act without delay in preventing and suppressing prize-fights. They are not to wait for the fight to begin, nor for the principals and others who are to engage therein to reach the place determined upon for the fight, before taking the necessary steps to prevent the same, but should proceed at once before the fight, and, upon receiving notice of the fact that it will be held, to issue proper process for the arrest of the guilty parties, put them under arrest, and require of them bonds to keep the peace, and to answer for the violation of law in the circuit court.

The question presented for the consideration of the judge of the Jefferson circuit court, when the injunction was applied for in this case, was whether or not the powers that might be invoked under the criminal jurisdiction of the courts were adequate to the suppression of the prize-fight about to come off, and, if not, what further powers might be exercised by him? As the statute required of him the exercise of all the powers of which he was possessed, and the right to employ the writ of injunction being one of those powers, it was his duty to grant it to the extent of preventing the use of the Auditorium for the holding of the prize-fight, if in the exercise of a sound discretion the facts before him justified such relief, in aid of the jurisdiction of the criminal courts. In granting the injunction to the extent indicated, the chancellor only exercised the jurisdiction that was exercised in draining the pond, and in suppressing the distillery, in the Massachusetts and Kansas cases, supra.

In none of the cases, supra, was there any question of property or pecuniary right involved; nor need there be any property right involved, so far as the State is concerned, in the maintenance of the public health, morals, or safety.

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These are all valuable rights, though not susceptible of a pecuniary estimate, which it is the duty of the State to protect by every means at his command; and, if a court of equity has the power to enjoin the use of private property as a nuisance which is dangerous to the public health, why may it not in like manner enjoin it where it constitutes a nuisance dangerous to the public safety or morals?

Is the use of land or a building for the maintenance of prize-fighting a public nuisance? In Wood on Nuisances (3d Ed.) section 68, the author says: "A public exhibition of any kind that tends to the corruption of morals, or to a disturbance of the peace or of the general good order or welfare of society, is a public nuisance. Under this head are included all puppet shows, legerdemain, and obscene pictures, and all exhibitions, the natural tendency of which is to pander to vicious tastes, and to draw together the vicious and dissolute members of society." That a prize-fight is an exhibition of the character here described, and consequently a public nuisance, there can be no doubt; and, if so, the use of a theater for prize-fighting is such a nuisance. Therefore the Legislatures of many of the States have enacted laws for their suppression, realizing, no doubt, that the remedies afforded by the general laws were not adequate to that end; and the courts have been uniform in upholding the statutes thus enacted. Thus, in Sullivan v. State, 67 Miss., 352, 7 South, 276, the Supreme Court of Mississippi said: "We think, however, that the evil sought to be protected against by the statute is the debasing practice of fighting in public places, or places to which the public, or some part of it, is admitted as spectators."

Such a meeting as would have been held in the Auditorium, in Louisville, to witness the prize-fight between

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McGovern and Corbett, if that fight had occurred, would doubtless have attracted some of the better and law-abiding class of citizens, curious to see such a spectacle as a prize-fight; but for every such reputable citizen thus attending, there would have been present a dozen gamblers, confidence men, bunco steerers, or pickpockets, gathered from all parts of the United States, men of idle, vicious and criminal habits and practices, whose business is to prey upon the public in some form or other, and many of them would remain in the community after the combat to ply their nefarious callings. Such an assembly could easily be led into a riot, or other unlawful disturbance of the public peace. In addition to the evils suggested, there would be the contaminating effect of such a meeting upon the youth of the city and State, which might prove of incalculable injury to their morals and future welfare. Such a gathering, too, would demand increased vigilance in the protection of the property of the city and its inhabitants, be a menace to good order, and disturb the peaceful pursuits and happiness of citizens who would be unwilling to patronize such an enterprize.

We conclude, therefore, that while a court of equity may not grant an injunction against the principals who were expected to engage in the fight in question, nor those connected with them as managers, trainers, etc., because the process of the criminal courts and the powers of conservators of the peace in the city of Louisville are, or ought to be, adequate to the prevention of the prize-fight, by the arrest and prosecution of the parties concerned, yet it was proper for the lower court to enjoin the owner, proprietor and managers of the Auditorium theater from permitting the holding of a prize-fight therein, and from allowing therein any future exhibitions of the same character, upon the ground that such a use of the building would constitute a

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public nuisance, dangerous to the public morals and safety. We think this exercise of power by the court can not be questioned, not because any new powers were conferred upon it by the statute against prize-fighting, but because such jurisdiction exists in courts of equity, and has practically always so existed, and, further, because its exercise was required in this instance by the exigencies of the case and the express language of the statute, which commanded the court to use all the power with which he was vested, to the end that the nuisance might be suppressed.

As already suggested, not the least of the evils connected with the holding of the prize-fight would be the presence of the immense crowds of lawless and turbulent men from all quarters. An injunction against the use of the building advertised as the place of the fight would go far toward preventing the assembling of this crowd, and thereby avert incalculable mischief, which could not well be averted by the criminal courts, or their ministerial officers, after the meeting of the audience at the place of the combat, or in the act of assembling; for, although every person who attends a prize-fight by that act violates the law, it would be impossible for the officers of the law to arrest any considerable number of them under such circumstances.

We do not regard this case as analogous to that of Neaf v. Palmer, 103 Ky., 496, 20 R., 176, 45 S. W., 506. In the latter case the action was brought by several property owners to enjoin the maintenance of a bawdy house upon the property of another. In passing upon the questions involved, this court said, in part: "It is not alleged that there are offensive sights or sounds about the obnoxious premises, but only that the property is made less valuable in the vicinity, and that the moral atmosphere is tainted and pestilential. The injury is wholly consequential. It seems to us, under these circumstances, criminal courts had

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best be left to enforce the criminal laws. They are confessedly adequate for the purpose of suppressing such evils."

There was nothing in the case, supra, to indicate that the bawdy house complained of could not be suppressed by the ordinary methods appertaining to the criminal court, and, the damages resulting to the plaintiff's property from the existence of the bawdy house being wholly consequential and speculative, it would, of course, have been improper in that case to employ the writ of injunction in aid of the mere property rights of the individual. But in the case at bar the complainant is the State—the sovereign—which is seeking by a writ of injunction to prevent a great evil, affecting the people of the city of Louisville, and the entire State as well, and which threatens irreparable injury to the public morals because of its cruelty, inhumanity, and debasing associations, and danger to the public safety because of its bringing together the lawless and turbulent elements of society from all quarters. Upon such a state of facts, and with the commands of the statute directing him to employ all his powers to avert the threatened evil, it was, in our opinion, no stretch of authority for the chancellor to employ the aid of the writ of injunction in such an emergency, to the extent, at least, of preventing the use of real property for the holding of the prize-fight. Nor do we think that the right of the chancellor to so employ the writ of injunction in this case is dependent upon the fact that a property right be involved. It may be justified upon the higher ground that the morals and safety of the public are involved, and that the public good is of the first consideration.

If the element of continuity were needed in this case to authorize the injunction, it is shown by the record to exist; for several witnesses testify to having attended contests similar to this in the Auditorium, and the advertisement

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of the McGovern-Corbett fight showed that it would come off at the Auditorium, and that it was one of a series of fourteen of such contests, all given under the auspices of the Southern Athletic Club, and several of which had already been held, and perhaps some of them elsewhere than in the Auditorium. The evidence shows, therefore, that the use of the Auditorium had, to some extent at least, been devoted to the maintenance of prize-fights, and that its use for that purpose is to be continued. We are of the opinion, however, that continuity is not a necessary element in this case. In Cincinnati Railroad Co. v. Commonwealth, 80 Ky., 137, the railroad was indicted for a public nuisance in leaving a hand-car on a public road; and, though the proof showed that the car did not remain for more than a day, this court held that the offense "was not to be determined by the length of time the thing that worketh hurt, inconvenience or damage to the public continues, or by the number of times it may be repeated, nor is it necessary, in order to constitute the offense, that actual injury be sustained by any person." In order to constitute a public nuisance, in the meaning of the law, it is not always necessary that the acts charged should have been habitual or periodical. Where a single act produces a continuing result, the offense may be complete, without a recurrence of the act. Thus one act upon the part of an individual in befouling a spring from which the public are accustomed to drink is a public nuisance. So is indecent exposure of one's person in a public place. Wood on Nuisances, sections 27, 57. To constitute the offense denounced by the statute as a prize-fight, or prize-fighting, it is not necessary that a number of such combats or that more than one combat should take place. We think one such offense at a given place would constitute a public nuisance, and it is the province of a court of equity to prevent nuisances that

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are threatened, and before irreparable mischief ensues, as well as to arrest or abate those in progress, and by perpetual injunction protect the public against them in the future.

Being of the opinion that the chancellor erred in dismissing the petition, and in refusing to perpetuate the injunction, in this case, to the extent of restraining the owners and managers of the Auditorium from permitting the use of that building for the holding of the prize-fight between appellees, McGovern and Corbett, the judgment is reversed, and cause remanded, with directions to set aside the order dismissing the petition, and to enter in lieu thereof the necessary decree perpetuating the injunction to the extent herein indicated.

Whole court sitting.

Judges Paynter, Barker and Nunn dissent.

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CASE 18—ACTION BY JACOB CULVER'S ADMR. TO SETTLE THE ESTATE OF HIS INTESTATE.—JUNE 20.

Kelley v. Culver's Admr.

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APPEAL FROM NELSON CIRCUIT COURT.

FROM A JUDGMENT SUBJECTING TO CREDITOR'S CLAIMS CERTAIN LANDS SOLD BY THE HEIRS OF DECEDENT TO JOHN S. KELLY. KELLY APPEALS. REVERSED.

ADMINISTRATORS—SUIT TO SETTLE ESTATE—CLAIMS OF CREDITORS—FILING—LACHES—LIS PENDENS—SALE OF LANDS.

Held: 1. Kentucky Statutes (1899), section 2087, provides: "When the heir or devisee shall alien, before suit is brought (on the ancestor's or testator's debt), the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation, to the creditors of the decedent or testator; but the estate so aliened shall not be liable to the creditors in the hands of a bona fide purchaser for a valuable consideration, unless action is instituted within six months after the estate is devised or descended, to subject same." HELD, not intended to create a lis pendens lien on the lands descended or devised, for the payment of the ancestor's debts, for a longer period than for six months after an action might have been begun to settle the estate and subject the land.

2. Civil Code Practice, section 432, provides: "A creditor appearing before the commissioner (to audit claims) and presenting his claim becomes thereby a party to the action (for settlement of the estate) and is concluded by the final judgment of the court allowing or rejecting his claim." HELD, whether a credi-

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tor of the estate filing his claim was made a party to the petition in the settlement suit, or not, could not affect the validity of the lis pendens.

3. To obtain the benefits of a lis pendens, the party asserting it must have not only a suit in which relief in rem is sought against specific property sufficiently identified by the record, to which the other claimant or title holder must be a party in fact, but he must prosecute his suit with reasonable diligence.

4. Where, after the expiration of the six months mentioned in Kentucky Statutes (1899), section 2087, one becomes a purchaser in good faith and for value, it does not matter how much he knows about who were the creditors of decedent, as nothing but a valid lis pendens can then affect the land as a lien.

5. Certain creditors of an estate were, as such, named and joined in a suit to settle the same by the administrator thereof, and were thereby, as well as by the advertisement of the commissioner to whom reference was had to audit claims, called on to file their claims, if they desired to avail themselves of the benefit of the action. They failed to file their claims, without excuse or explanation, till after the commissioner had reported all claims ascertainable, and till after two judgments of sale of land had been rendered in the action, and the last sale to pay debts of decedents and the costs of the suit and of administration had been confirmed. Two years after they should have set up their claims, they sought to enforce them against the residue of the land sold by the heirs to an innocent purchaser for value, after deducting what was necessary to discharge the known liabilities of the estate. HELD, that they were guilty of laches precluding their recovery.

JOHN S. KELLY AND GEORGE S. & JOHN A. FULTON, FOR APPELLANT.

STATEMENT.

Jacob Culver died intestate in Nelson county, Kentucky, in April, 1896, owning no personal estate except such as was exempt, and was set apart to his surviving widow; but was the owner in fee of two adjacent tracts of land, comprising 124 acres, of an inferior quality, and upon one of which tracts he was resident at the time of his death.

He left surviving him a widow and quite a large family of adult children, as his sole heirs at law. The intestate owed very few debts, amounting in the aggregate to $51.25, as shown by commissioner's report, in excess of a note due his wife,

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amounting to $450, including accrued interest, the payment of which was secured by a mortgage on one of the two tracts, in which mortgage she had herself united. Appellee, N. W. Halstead, was duly appointed and qualified as the administrator of the intestate, and within about three months after the intestate's death, to-wit, July 7, 1896, instituted this action in the Nelson Circuit Court making the widow, heirs and alleged creditors, including appellees, Bowling & Greenwell, defendants thereto, and sought a sale of so much of the realty as might be neccessary to pay the mortgage lien and other debts as well as a settlement of his trust.

Upon a reference to the commissioner to audit and report claims, the action progressed until a report was made showing the necessity of a sale of the land, or at least a large part thereof, to pay debts and costs of administration, which were reported in the aggregate on May 29, 1897, at $601.25, including an attorney's fee of one hundred dollars, allowed plaintiff as attorney for himself as administrator, to settle the estate upon which he was administering. Upon a confirmation of this report, a decree of sale was adjudged of a sufficiency of the land to pay said sum and costs. This sale was made by the commissioner on August 9th succeeding (August 9, 1897), at which sale the widow became the purchaser of the entire land. Upon exceptions filed by a part of the heirs to this reported sale, because they were not before the court, the report and sale were set aside, and a re-sale ordered, which was again made by the commissioner on May 9, 1898, being nine months subsequent to the first sale. At this second sale the widow again became the purchaser of sixty acres of the land for the amount neccessary to pay all debts presented, and costs, and producing a surplus of $28, and a homestead exemption for her life as widow was adjudged her in the residue of sixty-four acres, leaving the remainder therein to descend to the children and heirs at law of Jacob Culver.

The second sale was reported and confirmed at the May term, 1898, more than two years after the date of the death of the intestate, and twenty-two months after the institution of the suit to settle the estate, to which suit the appellees, Bowling & Greenwell, as alleged creditors, had been made parties defendant, and brought before the court by process, as alleged in the exceptions, and the plea of the appellant Kelly. On the 5th day of October, 1898, being five months after the second sale, and being two years and three months after the institution of the suit, appellant, John S. Kelly, in good faith and relying upon

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all creditors having presented, or been paid, their claims, if any they had, purchased from the heirs at law their remainder interests in the sixty-four acres of land, in which the widow had a homestead exemption right for her life, and at the same time he paid as alleged by him the full value of such remainder interest, viz., $302.50. A deed of conveyance was made him by all said parties for this remainder on the same day, October 5, 1898, and it was immediately placed to registration by him, as shown by the certificate attached to his deed on page 103 of this transcript.

Up to this time Bowling & Greenwell, appellees, had never presented any claim whatever against the estate of decedent and in fact as the record will show, had never even attempted to prepare or verify one until in May, 1898, at which time it now appears from their claim presented, for the first time in November, 1898, that they merely made a statement "of balance on account" and verified the same without ever presenting, or offering to present the same in court or elsewhere, until after appellant Kelly had purchased and paid for this remainder and placed his deed to record in October, 1898.

The master commissioner of the court, long after there had been a final judgment rendered in the cause directing a sale of the lands, and long after the second sale had been made, and his report thereof confirmed, and without there being then any reference of the case before him for further action, volunteers at the November term, 1898, to report this claim of appellees Bowling & Greenwell, and the administrator then seeks to subject this remainder interest which had been acquired by appellant as stated, to the payment of this claim of Bowling & Greenwell so long withheld by them, while the suit was pending, and so done without any excuse, cause or explanation for their delay, except an admission of their own neglect. The record will show they resided within two miles of the decedent's home; that they were apprised of his death by furnishing as they claim, in an itemized account, a coffin of $30, and burial suit $10, charged to have been furnished April 24, 1896. As will be seen by an inspection of their claim, much of it is claimed to have been sold after April 24, 1896, the first items being November, 1896, and then they charge up to the intestate's account $48.48, of an indebtedness incurred and created by a son, Sylvester Culver, for his own use, a large part being the summer and fall of 1896, long after the death of the intestate. (See account on pages 65 and 66 of transcript.)

When the administrator upon the presentation of this account for the first time in 1898 after Kelly's purchase and payment

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undertakes to subject this remainder interest to the payment of this claim, appellant Kelly interpleads, setting up his purchase, payment conveyance, registration of his deed, and pleads that this was all done by him in good faith without any information, knowledge or notice that Bowling & Greenwell held any claim, and relies upon the reports of the commissioner, orders and final judgments entered in the cause, and alleges his purchase and payment were made by him in the best of faith.

He then pleads and relies upon the culpable neglect of claimants by their failure to prepare or present any claim as against the claimed *lis pendens* lien, if any ever existed, and also as an estoppel against claimants. The deposition of appellant Kelly is the only testimony taken upon this issue and will be found upon page 96, &c., of the transcript. His testimony supports his plea to the fullest extent. Upon final hearing, as shown by the judgment appealed from, the court overruled the exceptions filed to the claim of Bowling & Greenwell and allowed same as a proper one against the estate of Jacob Culver and then further adjudged that the said tract of sixty-four acres of land in which the widow, Mary Culver, had a homestead right during her natural life, and in which appellant Kelly owned the remainder, is liable to the payment of Bowling & Greenwell's debt as well as the surplus of the $28.50 in court, also purchased by appellant Kelly, and further adjudged a sale of so much of said land as was necessary to pay said claim of Bowling & Greenwell "and the costs of this suit," thereby depriving appellant of his title to said land to that extent, and putting the entire costs of this suit upon him, being a suit to settle the estate in which the costs including attorney's fee is more than $175. The judgment further dismissed the petition of said Kelly, to all of which he excepted and prayed this appeal.

It is the contention of appellant that if the institution of the suit by the administrator within six months after the death of his intestate, seeking a sale of the land to pay debts, &c., created a *lis pendens* lien in favor of the creditors, that such lien or *lis pendens* has been lost to appellees, Bowling & Greenwell by their laches and own culpable negligence when it is sought to be enforced against the appellant as an innocent purchaser for a valuable consideration.

AUTHORITIES CITED.

Ky. Stats., sec. 2087; Herrman on Estoppel, vol. 1, chap. 1, sec. 5, subsec. 6, p. 4; sec. 7, subsec. 4, p. 6; Watson v. Wilson, 2 Dana, 406-411; Clarkson v. Morgan's Dev., 6 B. Mon., 447-8;

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Sugden on Vendors, p. 537; 3d P. Williams, 482; Erhman v. Kendrick, 1 Met., 146-7-8, &c.; Cook v. Clemens, 87 Ky., 570; Smith's Admr. v. Cotton, 63 S. W. R., 473.

NAT. W. HALSTEAD, ATTORNEY FOR APPELLEE.

STATEMENTS OF PROPOSITIONS DISCUSSED.

1. A *lis pendens* in suit to settle a decedent's estate is created not by filing a commissioner's report of estate and claims, nor by a creditor filing a claim against the estate, but by institution of the suit to settle filed within six months from death of decedent and before alienation by the heirs in the court having jurisdiction of the property and of the parties; the property sought to be subjected being real estate and being property described, and all the parties in interest being duly brought before the court, the heirs at law and creditors in so far as known, all this being done in the case at bar there is a *lis pendens* and the judgment appealed from should have been affirmed. 103 Ky., 403; 91 Ky., 324.

2. The $28 being in the possession of the court by being in the hands of the receiver was within the power of the court and as to it a *lis pendens* manifestly existed and appellant, a stranger to this record, in undertaking to purchase the right to this $28 is clearly a pendente lite purchaser. 91 Ky., 325.

3. The petition set out the existence of the debt now in controversy in the case by name and described the character of the debt, to-wit, funeral expenses, and asked the sale of the real estate to pay that debt, and described accurately the property sought to be subjected being real estate, and having before the court by the execution of process the persons claiming title to the property, then appellant having acquired an interest in the property during the pendency of the suit, acquired such interest as a pendente lite purchaser.

4. A lis pendens is created if the averments of a petition taken in connection with the exhibits are sufficient if enough is alleged to enable a party, upon reasonable enquiry, to identify the property and ascertain the object of the suit. 103 Ky., 403.

5. The legal maxim "that that is certain which may be made certain," applies to the question as to whether property is sufficiently described as to create a lis pendens, the rule is that there is lis pendens whenever there is enough in the proceeding to lead a vigilant mind to identify the property involved and to warn the world that they intermeddle at their own peril. 103 Ky., 403.

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OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

This suit was begun in 1896 by Jacob Culver's administrator to settle his estate. There was not enough personalty to pay the debts of the decedent, and his lands were described in the petition with the view to selling enough of them to pay the indebtedness. The heirs at law and certain creditors, including appellees Bowling & Greenwell, were made defendants, and had actual notice of the pendency and nature of the suit. A reference was had to the master commissioner November 14, 1896, to audit the claims against the estate. On the 29th day of May, 1897, the commissioner, who had previously publicly advertised for claimants, filed his report, showing all claims presented. There were no exceptions to this report. The court decreed a sale of enough of the land, after the allotment of a homestead to the widow, to satisfy the claims reported by the commissioner. The land was sold in August, 1897, and reported to the court at the following October term. Upon exceptions filed to the sale by certain of the heirs, it was set aside, as was the former judgment of sale, for a misprision. A resale was adjudged to pay the indebtedness allowed. That judgment was entered March, 1898. The sale was made under it May 9, 1898, and was confirmed, without exception, May 28, 1898. It was not necessary, as developed by this sale, to sell all the decedent's land to pay the indebtedness presented against the estate. On the 5th day of October, 1898, appellant bought the remainder of the land from the heirs at law, paid them the purchase money—an adequate price therefor—and took their deed of conveyance. On November 11, 1898, a claim for $117.84 was filed in court on this action by Bowling & Greenwell. They sought to have enough of the remaining land—that sold and conveyed to appellant by the heirs October 5, 1898—sold to satisfy their

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claim. Appellant resisted the application on the ground that he was an innocent purchaser for value, and without notice of Bowling & Greenwell's claim. He also pleaded their silence and delay in presenting their claim against the estate as an estoppel. The circuit court subjected the land to the payment of the claim. Bowling & Greenwell resided and did business in the county where the land lay, and in which the suit was pending. It is insisted by appellee that appellant was a *lis pendens* purchaser, and took the title of the heirs subject to the right of the creditors of their ancestor to subject his property in this action to pay his debts. Section 2087, Kentucky Statutes, 1899, is relied on. It is: "When the heir or devisee shall alien, before suit is brought, the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation to the creditors of the decedent or testator; but the estate so aliened shall not be liable to the creditors in the hands of a *bona fide* purchaser for a valuable consideration, unless action is instituted within six months after the estate is devised or descended, to subject same." This section was not intended to create a lien upon the lands descended or devised, for the payment of the ancestor's debts, for a longer period than for six months after an action might have been begun to settle the estate and subject the land. It merely held the estate subject to the decedent's debts until a reasonable time—six months—within which a *lis pendens* lien might be created against it. As to the validity and effect of the *lis pendens* after it was begun, the section did not change the common-law rule. Whether the creditor of the estate was made a party to the petition in the settlement suit, or not, can not affect the validity of the *lis pendens*, for the suit was brought for his benefit, in part, and by statute (section 432, Civ. Code Prac.)

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his merely filing his claim therein made him a party. Then the allegations of the petition favorable to his proceeding became adopted as allegations on his behalf. That he was made a party to the petition, in fact, merely brought actual notice to him, earlier than the commissioner's advertisement could, of the pendency and nature of the suit, of its privileges to him, and of the necessity of his availing himself of it if he would share in the distribution of its assets, and become entitled to all the other benefits that might flow from the *lis pendens*. His rights and his duties, as well, were those of an actual party to the suit. To obtain the benefits of a *lis pendens*, the party asserting it must have not only a suit in which a relief *in rem* is sought against specific property sufficiently identified by the record, to which the other claimant or title holder must be a party in fact, but he must prosecute his suit with reasonable diligence. Concerning this rule, and the limitations just adverted to, this court, in Clarkson v. Morgan's Devisees, 6 B. Mon., 447, said: "It has ever been regarded as a harsh and rigorous rule in its operation upon the rights of *bona fide* purchasers. The rule was dictated by necessity, as indispensable to the rights of litigants, and as the means of terminating litigation about the matter in contest. But being a hard rule, and operating with great severity, in many instances, upon the rights of innocent purchasers, it should never be carried, in favor of a complainant asking its enforcement, beyond the purpose and reason of its creation. To entitle him to enforce it against *bona fide* purchasers, he has been held to reasonable diligence in the prosecution of his suit, and should be guilty of no palpable slips for gross irregularities in the management of the same, by which injury may accrue to the rights of others who are not parties." Also, see, Watson v. Wilson, 2 Dana, 406,

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26 Am. Dec., 459; Erhman v. Kendrick, 1 Metc., 146; Debell v. Foxworthy's Heirs, 9 B. Mon., 228. The doctrine as announced in Clarkson v. Morgan's Devisees, supra, is approved by the text in Freeman on Judgments, section 208, and sustained by the authorities there cited. It is founded in part upon the idea that a stranger to a suit should not intermeddle with its subject-matter, except upon pain that he be bound by its conclusion; that he must take notice of its existence, and to that end he is required, at his peril, to exercise due diligence in informing himself as to its existence and nature. It would be an anomalous rule, indeed, that would require diligence of the innocent stranger, while condoning the most culpable negligence of the controlling party to the suit. The doctrine of *lis pendens* does not depend at all upon, nor is it affected by, the actual knowledge of the stranger as to the purposes of the suit, or the specific facts to be gathered from its record. He is bound, if bound at all, by the sufficiency of the record alone. So that if the suit be permitted to abate, or revivor be not had for unreasonable length of time (Watson v. Wilson, 2 Dana, 406), or if it is not presented with reasonable diligence, it is the same as if the suit had never been brought, so far as the doctrine under discussion is concerned.

In the case at bar, the creditors, Bowling & Greenwell, were named and joined in the suit as creditors, and thereby, as well as by the advertisement of the commissioner, were called upon to file their claim as creditors, if they had any, and desired to avail themselves of the benefit of the action. They, without excuse or explanation, failed to do so till after the commissioner had reported all claims ascertainable, till after two judgments of sale had been rendered in the action, till after the last sale to pay the debts of the decedent and the costs of the suit and of the administration

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had been confirmed, and till after the heirs had sold and conveyed to an innocent purchaser for value the residue of the land, after deducting all that was necessary to discharge the known liabilities of the estate; and not till more than two years after they might and should have set up their claim do they attempt to assert it against this land. By their prolonged silence under circumstances ordinarily calculated to produce action, they not unreasonably produced the impression upon any one investigating the record that they were not in fact creditors, or that they elected not to avail themselves of the purposes of the suit. It is equivalent to their having said to intending purchasers from the heirs at law: "I have no claim against this land." For silence may be as potent a disclaimer, under conditions calling for action, as would be a positive declaration. "No one is permitted to keep silent when he should speak, and thereby mislead another to his injury." 2 Herman on Estoppel, p. 1069. The admirably clear text of 1 Herman on Estoppel and *Res Adjudicata*, section 6, thus epitomizes this branch of estoppel: "If a man has led others into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that state of facts did not exist. A man is not permitted to charge the consequences of his own fault on others, and complain of that which he has himself brought about."

It is very earnestly claimed that the allegations of the petition filed by the administrator brought to settle the estate were enough to put appellant upon notice as to the existence of Bowling & Greenwell's claim, as if his knowing of it affected him in the least. The language of the petition that is referred to is this very vague and indefinite

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averment: "The defendant, Mary Culver, holds a mortgage on a part of the land hereinafter described, and which was a debt against said decedent amounting to about $450, and which is due and unpaid. And the defendants, Bowling & Greenwell, and Dr. James Muir and said Mary Culver are the only creditors of said decedent known to plaintiff." It is to be observed that the section of the statute before referred to (section 2087), affecting purchasers for value from the heir at law or devisee, does not require that the purchaser shall have been an "innocent" purchaser, or one without notice of the ancestor's indebtedness. It merely requires that he be a purchaser in good faith and for value. If, after the six months mentioned, one becomes such purchaser, it does not matter how much he knows about who were the creditors of the decedent. The only thing that can at that time affect the land as a lien is a valid *lis pendens*.

There is no question of fraud involved in this suit. Upon the facts recited, we are of the opinion that the pendency of the action ceased to constitute a *lis pendens* lien upon the land, by reasor of Bowling & Greenwell's negligence in failing for so long to present their claim, and to prosecute it with reasonable diligence.

The judgment of the circuit court is reversed, and the cause is remanded for proceedings not inconsistent herewith.

Whole court sitting.

Petition for rehearing by appellee overruled.

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CASE 19—ACTION BY ANDREW SWICE'S ADMX. AGAINST THE MAYSVILLE & BIG SANDY RY. CO., A KENTUCKY CORPORATION, AND THE CHESAPEAKE & OHIO RY. CO., A VIRGINIA CORPORATION, TO RECOVER DAMAGES FOR THE DEATH OF PLAINTIFF'S INTESTATE.—JUNE 20.

Swice's Admx. v. Maysville & B. S. Ry. Co., &c.

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APPEAL FROM MASON CIRCUIT COURT.

ON REHEARING. REHEARING GRANTED, FORMER OPINION WITHDRAWN AND JUDGMENT AFFIRMED.

RAILROADS—LEASE OF LINES—LIABILITY OF LESSOR—SERVANT'S INJURIES.

Held: Where a railroad company, under valid legislative authority, leases its lines to another road, it is not liable as an employer for injuries caused to employes of the lessee through the lessee's negligence.

A. E. COLE & SON, ATTORNEYS FOR APPELLANT.

The contention of appellees is that section 6, Kentucky Statutes, does not give a joint cause of action, but was enacted solely for the purpose of enlarging the class of persons who may recover at common law, that when plaintiff's intestate accepted employment he forfeited his rights as a member of the public, and therefore the only duty owed him was that growing out of his contract of employment with the Chesapeake & O. Ry. Co., to which contract the Maysville & B. S. Ry. Co., not being privy, it is therefore not liable for the tort.

This contention being supported in part by the case of Hukill v. Maysville & B. S. Ry. Co., a decision of the United States Circuit Court of Appeals, by Judge Taft, not construing a statute involved in the case at bar, the lower court preferred to follow it, and refused to follow the case of McCabe's Admx v. Maysville & B. S. Ry. Co., 66 S. W., 1054; Illinois Central R. Co. v. Winston's Admr., 23 R., 1233, and the case of Cin., N. O. & T. P. Ry. Co. v. Cook's Admr, 23 R., 2411, and therefore ordered the case to be sent to the Federal court. The Mason Circuit Court being an integral part of the judicial machinery of this State, and bound by the decisions of its highest tribunal, we submit in all fairness that such subservience to the deci-

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sions of the Federal court is violative of the constitutional rights of the citizens of this State, and in the derogation of the State's sovereignty.

Wherefore a reversal is respectfully asked.

AUTHORITIES CITED.

Ky. Stats., sec. 841; L. & N. R. Co. v. Louisville Trust Co., 174 U. S., 566; Orient Ins. Co. v. Daggs, 172 U. S., 557; Hooper v. California, 155 U. S., 648; N. N. & M. V. Co. v. McDonald Brick Co.'s Assignee, 59 S. W., 334; Com. v. M. & O. R. Co., 23 R., 788; Stout v. R. R. Co., 8 Fed. Rep., 794; Louisville Trust Co. v. Louisville, &c., Ry. Co., 75 Fed. Rep., 437; Am. & Eng. Ency. of Law, vol. 13 (2d. ed.), p. 84; Tullis v. Lake Erie R. Co., 175 U. S., 348; Mo. K. & T. R. Co. v. McCann, 174 U. S., 580.

E. L. WORTHINGTON AND W. H. WADSWORTH, FOR APPELLEES.

POINTS AND AUTHORITIES.

1. A railroad company which has leased its road to another company is not liable to the servants of its lessee for the lessee's negligence. McCabe v. Maysville R. Co., 23 Ky. Law Rep., 2328; Freeman's note to Lee v. Southern Pac. R. Co., 58 Am. St. Rep., 152; Hukill v. Maysville R. Co., 72 Fed. Rep., 745; East Line Ry. Co. v. Culberson, 13 Am. St. Rep., 805; s. c., 72 Texas, 375; Baltimore & Ohio Ry. Co. v. Paul, 143 Ind., 23; Virginia Ry. Co. v. Washington, 86 Va., 629; Lee v. Southern Pac. R., Co., 58 Am. St. Rep., 140.

2. A compliance by a foreign corporation with the requirements of section 841, Kentucky Statutes, does not make it a citizen of Kentucky in the meaning of the Federal Constitution conferring jurisdiction on the Federal courts in controversies between citizens of different States. A corporation is not a citizen at all within the meaning of the Federal Constitution. St. Louis Ry. Co. v. James, 161 U. S., 545; Louisville R. Co. v. Louisville Trust Co., 174 U. S., 552; Taylor v. Illinois Central R. Co., 89 Fed. Rep., 119; Walters v. Chicago R. Co., 104 Fed. Rep., 377; Westheider v. Wabash R. Co., 115 Fed. Rep., 840; Hollingsworth v. Southern Ry. Co., 86 Fed. Rep., 356.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

Appellant filed this suit against the Maysville & Big Sandy Railroad Company, a Kentucky corporation, and the Chesapeake & Ohio Railway Company, a Virginia cor-

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poration, to recover for the death of her intestate. The Chesapeake & Ohio Railway Company filed its petition to remove the case to the Circuit Court of the United States for the Eastern District of Kentucky. The court ordered the removal, and the plaintiff appeals.

The Chesapeake & Ohio Railway Company is the lessee of the Maysville & Big Sandy Railroad Company. The intestate was a laborer in the service of the Chesapeake & Ohio Railway Company on a coal dock in a coal yard near the city of Maysville, and while walking on a narrow elevated platform, adjoining the coal dock, he fell therefrom, by reason, as alleged, of its not being sufficiently secured. The order of the circuit court removing the case rests on the idea that no cause of action was stated against the Maysville & Big Sandy Railroad Company, and the fact that it was made a defendant to the petition did not affect the right of the real defendant to a removal of the case. The lease made by the Maysville & Big Sandy Railroad Company to the Chesapeake & Ohio Railway Company, and the authority under which it was made, are set out in the case of McCabe's Adm'x v. Maysville & Big Sandy Railroad Co., 112 Ky., 861, 23 R., 2328, 66 S. W., 1054. It was there held that the lessor company continued liable to the public for the discharge of the obligation imposed on it by law; but whether it would be liable to the servants of the lessee for injuries received by reason of its negligence was a question not decided. The cases holding that the lessor is not liable for injuries to the servants of the lessee from its negligence are referred to in the opinion, and distinguished from the case before the court. The case now presented, requires a determination of this question, as Swice was in the employment of the lessee, and was injured, as alleged, by reason of its negligence.

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In Lee v. Southern Pacific Railroad Co., 116 Cal., 97, 47 Pac., 932, 38 L. R. A., 71, 58 Am. St. Rep., 140, the court, in passing on the question, said: "In all cases where a valid lease is found (or, as in this discussion, where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of the relationship of employer and employe under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company, when it attaches, does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employe of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employe of the operating company by reason of the negligence of a fellow servant, or want of skill and care in the lessor company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible." In a note to this case in 58 Am. St. Rep., 155, after a review of many cases, it is said: "As to employes of a lessee corporation, the weight of authority, whether the lease is authorized or not, is to the effect that they can not recover for injuries received through the negligence of such lessee or its servants or agents. Virginia, etc., Ry. Co. v. Washington, 86 Va., 629 [10 S. E., 927, 7 L. R. A., 344]; Hukill v. Maysville, etc., R. R. Co. (C. C.), 72 Fed., 745. The duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arises the reciprocal obligations from

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one to the other. It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road; and it may be asked, does the latter owe him the duty of a master to his servant, or guaranty that the master with whom he has voluntarily contracted will perform its obligation to him? It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's roadbed, and was inflicted upon one of its own employes by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor would be held liable merely because it owned the road. East Line, etc., Ry. Co., v. Culberson, 72 Tex., 375 [10 S. W., 706, 3 L. R. A., 567], 13 Am. St. Rep., 805."

When the Legislature authorized the Maysville & Big Sandy Railroad Company to lease its road, it necessarily contemplated that the lessee should have servants to run it; for the lessee could not otherwise operate it. And to hold the lessor responsible to these servants would not be to give fair effect to the legislative action. The question is fully discussed, also, in Virginia Midland Railroad Co. v. Washington, 86 Va., 629, 10 S. E., 927, 7 L. R. A., 344, and in that opinion other authorities are collected. It seems to us that the distinction made is sound, and there seems to be little or no conflict of authority on the subject.

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The other questions discussed were disposed of in Davis' Adm'r v. Chesapeake & Ohio Ry. Co. (decided at this term), 25 R., 342, 75 S. W., 275.

The former opinion herein (see Swice's Adm'x v. Maysville & Big Sandy Railroad Co., 24 R., 1142, 70 S. W., 1117) is withdrawn, and the judgment appealed from is affirmed.

CASE 20—ACTION BY THE LOUISVILLE & N. R. CO. AGAINST THE LOUISVILLE BRIDGE CO. AND THE PITTSBURG, C. C. & ST. L. RY. CO., FOR BREACH OF CONTRACT.—JUNE 20.

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Louisville Bridge Co. v. L. & N. R. R. Co. Pittsburg, C., C. & St. L. R. R. Co. v. Same.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

FROM THE JUDGMENT RENDERED DEFENDANTS SEPARATELY APPEAL, AND PLAINTIFF PROSECUTES A CROSS APPEAL. AFFIRMED.

INDIVISIBLE CONTRACT—SPLITTING OF CAUSE OF ACTION—OBJECTION—WAIVER—EVIDENCE—TABLES—SECONDARY EVIDENCE.

Held: 1. Two suits on the same contract were begun at nearly the same time in the same court, in both of which defendant appeared and filed demurrers, which were heard together; only one opinion being rendered in both cases. Defendant answered, and both causes proceeded for several years; defendant at no time making objection to the splitting of the cause of action. After a judgment in one suit, and some five years after the suits were begun, defendant pleaded that judgment in bar in the other suit; claiming that the cause of action had been split. HELD, that defendant had waived its right to object to the splitting of the cause of action.

2. In a suit by a railway company to recover excessive tolls charged by defendant bridge company, the railway company had no means of knowing the amount of freight that had passed over the bridge, except by the waybills and transfer slips which it had preserved, and these were very numerous. HELD, that a tabulated statement of the facts shown by the bills and slips was admissible in evidence on being sworn to as correct by the

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officer of the railway company under whose supervision the statement was prepared, and after an offer to allow the opposing party to examine the original papers.

3. The waybills and transfer slips were not objectionable as secondary evidence.

4. A plaintiff in an action on contract can not recover where there is no data from which the amount to which he is entitled can be ascertained, though it is clear that he is entitled to recover something.

GIBSON, MARSHALL & GIBSON, HUMPHREY, BURNETT & HUMPHREY, FOR APPELLANTS.

STATEMENT.

On November 22, 1892, the appellee, the Louisville & Nashville Railroad Company, brought a suit in what was then the Louisville Law and Equity Court, the case being numbered on the docket 5205. The appellants, the Louisville Bridge Company, and the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, and certain other railroad companies were made parties defendant. The Louisville & Nashville Railroad Company sought to recover against the Louisville Bridge Company and the other defendants a certain amount of money alleged to have been wrongfully collected from it and retained by the Louisville Bridge Company or wrongfully paid over to the other defendants. The suit involved a written contract dated June 5, 1872, and the sums sought to be recovered were those so wrongfully rebated or wrongfully paid over since January 1, 1892.

A judgment in the sum of $192,478.44, including interest, was entered in favor of the Louisville & Nashville Railroad Company against the Louisville Bridge Company by the lower court June 27, 1896. It included the tolls found to have been illegally exacted from the Louisville & Nashville Railroad Company for the four years—1892, 1893, 1894 and 1895. This judgment was affirmed by this court on May 24, 1899. The Opinion of the court is reported under the style of Louisville Bridge Company v. Louisville & Nashville Railroad Company, 21 Ky. Law Rep., 272. This opinion states the history of that cause and of the contentions of the parties therein.

On December 28, 1892, a little more than a month after the above suit was filed, the Louisville & Nashville Railroad Company filed another suit in the Louisville Law and Equity Court, numbered upon its docket 5249. This suit was upon exactly the same contentions as were made in the case decided by this court, and the claim was for tolls alleged to have been illegally ex-

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acted during the eleven years ending December 31, 1891. (R. vol. 1, pp. 1 to 10.)

It will thus be seen that the Louisville & Nashville Railroad Company, having claims against the Louisville Bridge Company and certain railroad companies for tolls exacted contrary to the provisions of a written contract dated June 5, 1872, brought two suits. In one of them the tolls were alleged to have been illegally exacted during the four years after January 1, 1892, and in the other the tolls were alleged to have been illegally exacted during eleven years prior to January 1, 1892.

In the first of these suits, as stated above, the Louisville & Nashville Railroad Company recovered a judgment against the Louisville Bridge Company, and this judgment was subsequently affirmed by this court.

In the second suit, which is now before the court on this appeal, the Louisville & Nashville Railroad Company secured a judgment for $259,280.61 against the Louisville Bridge Company and for $140,311.10 against the other appellant.

We are seeking a reversal of these judgments on various grounds.

POINTS AND CITATION OF AUTHORITIES.

1. Where two suits are brought involving breaches of the same contract, all of which breaches had been suffered prior to the bringing of either suit, the defendant in the second suit may plead the pendency of the first in abatement, or may plead to the merits in both, and, one of the causes being determined, may plead the judgment in that cause as in bar of a further prosecution of the other cause.

2. A right of action can not be split into two suits. Freeman on Judgments, sec. 240; Black on Judgments, secs. 734, 735, 747; 1 Ency. Plead. and Prac., 148, 153, 154, 155; Bliss on Code Pleading, sec. 118; Powell v. Weiler, 11 B. Mon., 186; Winestock v. Bellwood, 12 Bush, 139; Pilcher v. Ligon, 91 Ky., 228; Bendernagle v. Cocks, 19 Wend., 207; S. C., 32 Am. Dec., 448; Secor v. Sturgis, 16 N. Y., 553; Camp v. Morgan, 21 Ill., 255; Casselberry v. Forquer, 27 Ill., 170; Rosenmueller v. Lampke, 89 Ill., 212; S. C., 31 Am. Rep., 75; Richardson v. Eagle Machine Works, 78 Ind., 422; S. C., 41 Am. Rep., 584; Whittaker v. Hawley, 30 Kansas, 317; S. C., 1 P. R., 508.

3. Failing to plead in abatement does not prevent plea in bar. Black on Judgments, sec. 734; Secor v. Sturgis, 16 N. Y., 554; Warren v. Cummings, 16 Cush., 104; Hughes v. Dundee Mortgage Co., 26 Fed. Rep., 832; Baird v. United States, 96

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U. S., 430; Farrington v. Payne, 15 Johnson, 432; Lucas v. Lacompte, 42 Ill., 303; Oliver v. Holt, 11 Ala., 574; S. C., 46 Am. Dec., 228; Wichita R. R. v. Beebe, 39 Kansas, 465; S. C., 18 P. R., 502; Bolling Coal Co. v. Whittaker Brick Co., 52 Kansas, 747; S. C., 35 P. R., 810.

4. Judgment should be reversed on the merits. Louisville Bridge Co. v. Louisville & Nashville R. R. Co., 21 Ky. Law Rep., 271.

5. Exceptions to depositions of witnesses on ground of incompetency. Price v. Earl of Torrington, 1 S. L. C., 7 Am. Ed., 542; star page 397; also at page 552, star page 407; 1 Wharton on Evidence, secs. 238 239, 240, 241, 661, 662; 2 Jones on Evidence, secs. 323, 325; Poor v. Robinson, 13 Bush, 294; Chaffee v. United States, 18 Wall., 517; Merrill v. Ithaca R. R., 16 Wend., 586.

6. Reconsigned traffic.

7. Tolls on reconsigned traffic in judgment against second appellant.

8. Interest. Moore v. Pendergrast, 6 J. J. M., 535; Adams Express Co. v. Milton, 11 Bush, 50; Neal v. Keel's Executors, 4 Monr., 163; Henderson Cotton Co. v. Lowell Shops, 86 Ky., 668.

DODD & DODD, ATTORNEYS FOR LOUISVILLE BRIDGE CO.

POINTS.

In addition to the two propositions, discussed by our colleagues, we respectfully submit that, on the basis of the admissions made in the pleadings, when read in connection with the agreed facts and all of the evidence, the following meritorious propositions clearly apply to this case and show the judgment to be erroneous, to-wit:

1. That on the admissions made in the pleadings and stipulated in the agreed facts the appellee's petition should have been dismissed.

2. That the laches and acquiescence of the appellee for more than fifteen years in the practical and contemporaneous construction given by the parties to the said contract, and its own acknowledged violations of the terms thereof during the period covered by this suit, should bar and estop it from asserting its present demands against the bridge company.

3. That the five-year limitation statute logically applies to a part, if not to all, of the appellee's claim, because its re-formed petition, styled by it to be "in lieu of the (original) petition heretofore filed and the amendments thereto," was not filed until February 11, 1895, and its alleged *new cause of action*,

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therein attempted to be stated, was not completed by amendment until March 20, 1897 (Rec. 49 and 122), and was then allowed to remain dormant, without preparation or prosecution, from 1897 until 1901 (Rec. 175).

4. That the Louisville Bridge Company never received nor had the use and benefit of any part of the principal sum of $150,775.88 and $108,504.73 interest *with which it is primarily charged in solido* in the judgment complained of, nor ever at any time had in its treasury or under its control any sum in excess of the fixed charges enumerated in the contract, and that, if required to pay this judgment, it would have to do so out of its *corpus*, and this, too, at a time when the appellee, Louisville & Nashville Railroad Co., and appellant, Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. are still in the possession of its properties under the contract of 1872, all of which is contrary to the plain meaning of the said contract.

5. That the tolls charged by appellee on reconsigned freight traffic, which said reconsignments did not pass over nor pay any tolls to the bridge company, aggregate, during the four years prior to January 1, 1892, the following principal sums, to-wit:

1888	$23,860.59
1889	41,377.41
1890	27,771.24
1891	29,203.51
	$122,212.75 (Rec. 343).

If this reconsigned traffic, which never passed over the bridge, nor paid any tolls thereon, be eliminated it would reduce the principal sum of $150,775.88 by the sum of at least $35,653.40, exclusive of interest to the date of the judgment (Rec. 350).

We insist that, after the payment of the tolls on the original consignments which passed over the bridge, these reconsignments, over a different line of road than the original consignments and not passing over the bridge, should not be charged against the bridge company even if they had been properly reported, which was not the case.

6. That of the $150,775.88, principal of the judgment rendered, the four northern co-tenants of the appellee as its connecting carriers were suffered and permitted by the appellee to collect, report, and retain *as parts of their own traffic*, and without the knowledge or consent of the bridge company of appellee's claim to any interest therein, the following respective sums:

Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co...$81,785.94
Louisville, New Albany & Chicago R. R. Co..... 27,085.25.

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Louisville, Evansville & St. Louis R. R. Co., ...37,485.38
Ohio & Mississippi R. R. Co. 3,539.08
"Route not given" 880.23

Aggregating the principal sum of .....$150,775.88 (Rec. 362).

No part of the above sums were ever *paid* over to or *received* by the Louisville Bridge Company.

In the face of these admitted facts the judgment, as drafted and entered by the lower court herein, recited that these several sums were "*primarily due and payable to said plaintiff by the defendant, Louisville Bridge Company,*" and refused to subrogate the Louisville Bridge Company, upon the payment thereof, to any of the rights of the appellee against any of the other tenants, or to make them contribute any part thereof.

7. That the judgment, in action No. 5205, rendered June 27, 1896, is not a precedent or an adjudication against the appellant Bridge Company in this case. The patent evidential differences between the facts in the two cases are briefly pointed out.

8. That in no event should interest, prior to the rendition of the judgment, March 11, 1902, aggregating the large sum of $108,504.73, have been allowed under the facts in this case.

AUTHORITIES CITED.

On Practical Construction and Laches. Louisville Turnpike Co. v. Shadburn, 1 Ky. Law Rep., 325; Chicago v. Sheldon, 9 Wall., 54; Topliff v. Topliff, 122 U. S., 510; Attorney General v. Drummond, 1 Dru. & Wal., 366 (2 H. L. Cas., 837); Chicago Ry. Co. v. Northern Pac. Ry. Co., 101 Fed. Rep., 795 (42 C. C. A., 28); Newton v. Wooley, 105 Fed. Rep., 546; Accumulator Co. v. Dubuque Ry. Co., 64 Fed. Rep., 74 (12 C. C. A., 40); Lumber Co. v. Stump, 86 Fed. Rep., 578 (18 C. C. A., 569); Publishing Co. v. Swift, 97 Fed. Rep., 296 (38 C. C. A., 192); Hammond v. Hopkins, 143 U. S., 250; Johnson v. Mining Co., 148 U. S., 370; Martin v. Letty, 18 B. Mon., 582; Harwood v. Railroad Co., 17 Wall., 87.

On Limitation: Hyatt v. Bank of Ky., 8 Bush, 200; Ky. Cent. R. R. Co. v. Campbell, 7 Ky. Law Rep., 525; Leatherman v. Times Co., 88 Ky., 291; Tate v. Hawkins, 1 Pet., 360.

On Landlord and Tenant; Trabue v. Ramage, 80 Ky., 323.

On suretyship and Subrogation: Secs. 486, 4665 and 4666 Ky. Stats.; Veach v. Wickersham, 11 Bush, 261; Elbert v. Jacoby, 8 Bush, 545; Evans v. Rhea, 12 Ky. Law Rep., 224;

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Bickel v. Judah, 3 Ky. Law Rep., 728; Curry v. Curry, 87 Ky., 671; Warfield v. Brand, 13 Bush, 93; Givens v. Flannery, 105 Ky., 451.

On Differentiation and Interest: Louisville Bridge Co. v. L. & N. R. R. Co., 21 Ky. Law Rep., 271-278; Louisville Gas Co. v. Hargis & Eastin, 17 Ky. Law Rep., 1190.

HELM, BRUCE & HELM, FOR APPELLEE.

POINTS AND AUTHORITIES.

1. Where two actions are brought upon a continuing account, with separate items of the account involved in each action, an objection to maintaining the two suits must be made by demurrer if the fact appears upon the face of the adversary's pleading, and if not by plea in abatement, and the failure to thus object is a waiver of all objections to the prosecution to a final conclusion of both actions. Miles v. Garrison, 3 Keyes (N. Y.), 40; Boyle v. Robbins, 71 N. Y., 132; Civil Code, secs. 92 and 118; Gunn v. Gudehus, 15 B. Mon., 449; Curd v. Lewis, 1 Dana., 351; Warren v. Glynn, 33 N. Y., 340; Baker & Rubel v. Whipps, 6 Ky. Law Rep., 307.

2. Entries in books of original entry have been allowed to be introduced in deference to the business world, and to the fact that when made contemporaneously with the transactions which they purport to record, they are suppose to speak the truth, because there is every motive ordinarily for verity and none for falsity. In the same way, if an account is kept of large business transactions, not by entries in the books, but by the preservation of the original data, they should have the same self-deserving effect and influence as original book entries.

3. The reason for the rule that in order to introduce entries in books of original entry you must produce the man who made them, or account satisfactorily for his absence and prove his handwriting, is based upon the theory that if the party relying upon the evidence does not do so, he is supposed to have some sinister motive for failing to do so. Whenever, therefore, for *any good reason* this can not be done, it is competent to prove the original entries by any competent person, and in the same way it is competent to prove the original data preserved in any proper way. Greenleaf on Evidence, 1 vol., 15th ed., sec. 120; Greenleaf on Evidence, 16th ed., sec. 120a; Tabor v. Riggs, 1 Pet., 596; 1 Greenleaf on Evidence, sec. 82; Chisholm et al. v. Beeman Medicine Co., 43 N. E., 796; Donovan v. Boston M. R. Co., 33 N. E., 583; Northern Pacific Railway Co. v. Keyes et al., 91 Fed.. 47; Commonwealth v. Tate, 89 Ky., 587.

4. Wherever an amount is due, and it is the duty of the

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debtor to know the amount of the debt, then interest runs on the amount from the time it should have been paid. Henderson Bridge Co. v. O'Connor & McCulloch, 86 Ky., 303; Schmidt, Trustee, v. L. & N., 85 Ky., 289.

5. This is essentially a suit for an accounting, and the prayer in this case is the usual prayer in such cases, and that is to have the accounts stated, and for a judgment for the amount which might be shown to be due. In such a case such a prayer is sufficient for the recovery of interest, that being a part of the amount due as much as the principal itself.

Under our Code, section 90, wherever there is a defense made to the action judgment should go for whatever upon the whole record the plaintiff is shown to be entitled to, and if the record in this case shows that appellee was entitled to interest under the authorities, the prayer under section 90, in view of the fact that there was a defense, is sufficient. Bank of Russellville v. Coke, 20 Ky. Law Rep., 291.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

On June 5, 1872, a contract was made between the Louisville Bridge Company, the Louisville & Nashville Railroad Company, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, and certain other railroad companies, by which the railroad companies agreed to send their traffic over the bridge, and bound themselves to pay the bridge company such rates therefor as would pay certain fixed charges, create a sinking fund to meet an outstanding debt, and pay the stockholders a given annual dividend. This contract is set out in the opinion of this court in the case of Pittsburg, C., C. & St. L. Railway Co. v. Dodd., 115 Ky., 176, 25 R., 255, 72 S. W., 822. By the terms of the contract, the railroad companies using the bridge were placed on terms of absolute equality; that is, each was to pay at the same rate for traffic it did over the bridge. For convenience, the Louisville & Nashville Railroad Company did not pay its tolls directly to the bridge company, but paid them to the connecting lines north of the river, and they settled with the bridge company. After the rates had been fixed,

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and things had gone on for a number of years, an arrangement was made by which the bridge company did not require the roads north of the river to pay the full amount of their tolls, but at the end of each quarter the charges were rebated to them to the extent that there was a surplus over and above what was called for by the contract, and they were only required to pay to the bridge company the balance. This was without the knowledge or consent of the Louisville & Nashville Railroad Company, which continued to pay the full tolls. The rebating of the tolls began about the year 1881, and was not discovered by the Louisville & Nashville Railroad Company until some time in the year 1888, when some facts came to the knowledge of its president which led him to suspect what was going on. He wrote to the bridge company, complaining, but nothing was done, although various communications passed between the parties. Finally, in the year 1892, the Louisville & Nashville Railroad Company filed this suit against the bridge company and the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, seeking to recover of them on account of the excessive tolls charged for the years 1881 to 1891. About the same time it filed another suit to recover for the same matters for the year 1892. In the latter suit, amended pleadings were filed, setting up a like claim for the years 1893, 1894 and 1895. Finally this case was tried, and a judgment rendered in favor of the Louisville & Nashville Railroad Company. The defendants appealed to this court, and the judgment was affirmed. See Louisville Bridge Company v. Louisville & Nashville Railroad Company, 106 Ky., 674, 21 R., 271, 51 S. W., 185. After that judgment had been rendered, the defendants filed an amended answer in the other suit, involving the years from 1881 to 1891; pleading that judgment in bar of the action. The court sustained a demurrer

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to the pleading. Evidence was then heard, and, the case being submitted, the court gave judgment in favor of the Louisville & Nashville Railroad Company for the years 1888, 1889, 1890 and 1891, but dismissed its claim as to the years prior to 1888. From this judgment the defendants have appealed, and the plaintiff prosecutes a cross-appeal. The matters mainly relied on for reversal on the original appeal are the ruling of the court on the plea in bar, and its admission of the evidence offered by the plaintiff to make out its case.

As to the plea in bar, it is earnestly maintained by the appellants that the whole claim for all the years from 1881 to 1895 was based on the same contract, and, being an entirety, the plaintiff could not split its cause of action and sue for part of it in one suit and for the remainder in another. Numerous authorities are cited by counsel in support of the proposition that, where an entire cause of action is split, a judgment in one case will bar a second action for the rest of the claim. The principle is sound, and has been applied very often by the courts. But it has no application where the defendant consents to the splitting of the cause of action. A party to an action is never allowed to take advantage of that which he consented to, and his consent may be shown expressly, or it may be implied from the circumstances, as in other cases. Both the actions referred to were brought in the same court, and near the same time. The defendants appeared in both actions, and, without making any objection to the cause of action being split, or the bringing of two suits, filed a general demurrer to the petitions. These demurrers were heard by the court together, but one opinion being delivered, the court treating the two actions as one. The demurrer was sustained, amended pleadings were filed, the general demurrer was filed again,

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and again the two actions were heard together by the court, and the demurrers were overruled, the court delivering, as before, but one opinion in the two actions. After this, without any objection to the bringing of two suits, the defendants filed answer in each, and the issues were made up, the two actions moving on together side by side; and no objection was made until the year 1897, or something like five years after the suit was brought, when, one of the actions having been tried, an amended answer was filed, pleading the judgment in that action in bar of the other. In the one action the plaintiff sought to recover for the *time* down to the year 1891, and in the other for the time after 1891. If objection had been made to the separation of the cause of action, the plaintiff might have dismissed one suit without prejudice, and set up the entire cause of action in the other. This would have profited the defendants nothing. It was more convenient to the parties to practice the claim for the two periods separately, for the reason that the evidence was different, and it would have been somewhat confusing to have prepared the whole matter in one suit. Besides, a very large sum of money was sued for—one half a million of dollars—and the bridge company had nothing to gain by advertising the large claim against it in one suit. When a party is put to an election, and elects what course he will follow, he can not thereafter abandon that election to the prejudice of the other party. When the two suits were filed and were heard together as one action on the demurrers, it was incumbent on the defendants to make objection to the form of proceeding then or not at all. Their silence then was an acquiescence in the prosecution of the two actions. One of the objects of the Code is to expedite legal proceedings by requiring objections not going to the merits of the action to be made

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when the occasion for them arises. All such objections are waived if not made before issue is joined on the merits. Gunn v. Gudehus, 15 B. Mon., 449. All objections of mere form come within this rule, which is founded upon reasonable principles, for otherwise the rules of procedure, which are intended to facilitate the administration of justice, become in the hands of the skillful practitioner the instruments for defeating justice. Curd v. Lewis, 1 Dana, 351; Warren v. Glynn, 37 N. H., 340. Under the facts as shown by the record, we conclude that the defendants acquiesced in the bringing of the two separate actions, and by their course led the plaintiff to understand that the prosecution of the two actions was consented to by them, or at least that the objection thereto was waived. After all this, it was too late, after one action had proceeded to judgment, to object in the other action to that which for three years had at least impliedly been consented to.

The objection as to the admissibility of the evidence arises in this way: The bridge company kept no record of the business done by the Louisville & Nashville Railroad Company, as it paid its tolls to the connecting lines, and they settled with the bridge company. When it became necessary to ascertain how much the tolls of the Louisville & Nashville Railroad Company amounted to, a very difficult question was presented, as no record of the payments of the money had been kept. Previous to the year 1888, the Louisville & Nashville Railroad Company had no records at all on the subject; but after the year 1888 it kept the waybills on the freight, or, where the waybill followed the goods, the transfer slip, from which the waybill was made out, was preserved. From these original papers kept by the railroad company, with much labor, it made out a detailed statement of the tolls paid by it subsequent to the year

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1888. Objection is made as to the competency of these papers, on the idea that they were simply loose memoranda. This can not be maintained. They were the original and best evidence of the transaction, and were the record kept by the railroad company to show its transactions. In cases of this sort the law does not demand impossibilities; it only demands the best evidence practicable; and no witness could carry in his mind these transactions. The only possible way to prove them is from the record kept at the time the transactions occurred. It is also objected that these original papers were not in fact produced before the commissioner to whom the case was referred to state the account; but he reports that he examined them, and that they were not filed for the reason that they would fill up the commissioner's office, and were too numerous to be brought into court. This was all that the plaintiff could do. The defendants and their attorneys were also afforded opportunities to examine the papers. The defendants also complain that the statements of the account made out from these papers were allowed in evidence. Proof was taken by the officer of the railroad under whose supervision and oversight the work was done, and he testifies to its correctness, and that it was done under his eye; that is, that he superintended it, checked it up, and knew it to be correct. It was unnecessary to bring in all the clerks who had made out the original waybills or prepared the numerous statements. The waybills, being the records of the company of its transactions made at the time, were original evidence, and admissible without further proof, because made and kept as a record in the usual course of business. The proof by the two witnesses who testify to the correctness of the statements made up from these waybills was sufficient to make out a *prima facie* case, which was supported by the

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commissioner's own investigation, and his finding the statements correct in so far as he tested them; but, of course, he could not examine all the items. The papers would, perhaps, have filled the courtroom, and no good could have come from bringing them in before the judge, for no court could go through all these papers and make up a statement. If he did it, not being a practiced accountant, his work might have been worth intrinsically less than his commissioner's. Besides, the defendants took no proof. The roads north of the river had their records, and, if the proof by the plaintiff was not correct, they had it in their power to show the truth. This they made no effort to do. For the years after 1892 there was little dispute about the amount of the tolls. The result reached by the commissioner for the years from 1888 to 1891 corresponds substantially with the amount fixed for the years after 1892. The cardinal feature of the common law is its want of specific rules. It rests on a few general principles. It requires the best evidence that the case is reasonably capable of, but it requires no more. The issue in this case depended upon a statement to be made up from thousands of waybills, which, if all brought in, would have filled up the commissioner's office. The only practical way of getting at the truth was to make out a statement from these waybills. If either party doubted the accuracy of the statement when prepared, the court could afford him access to the papers, and give him opportunities to manifest the truth to him. To demand of the plaintiff more than was shown here would be to deny a recovery in cases of this character. The rule of evidence is that no evidence shall be received where there is better evidence which may reasonably be had. It is intended to prevent fraud, but it is not intended to prevent the administration of justice, where all the evidence is produced by the party

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of which the case is reasonably susceptible. In Northern Pacific Ry. Co. v. Keyes (C. C.), 91 Fed., 47, where similar tables were introduced in evidence and objected to, the court said: "To have called each of the clerks would have added very little to the trustworthiness of the evidence. No clerk conducted any entire investigation, but various details were placed in the hands of forty or fifty different employes, and each contributed his computation to the general result. No clerk could have testified that the tables were correct, for the reason that they were not made by him; neither could any single clerk testify that the figures from which the tables were compiled were correct, for he only contributed a small fragment to the general result. The method adopted was the only practicable one for conducting the investigation. It would have been absolutely impossible for any one man to have compiled the general result without delaying the case for years. A reasonable safeguard against falsification in the preparation of such statements is furnished by placing the records from which they are compiled freely at the disposal of the adverse party. It was the duty of the companies to do this, and to give the Attorney General the fullest assistance in explaining such records, and to allow him to place the same in the hands of expert accountants, if he so desired, for the purpose of detecting error or falsification in the testimony as prepared by the companies. The record shows that this was done throughout the taking of the testimony in these cases. We must assume that the Attorney General was satisfied of the correctness of the testimony, from the fact that he declined to investigate its trustworthiness." This seems applicable to the case before us. The evidence in the case is the original record kept by the railroad company of the transactions as they occurred. The statements or tables

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prepared by the clerks are not, properly speaking, evidence at all. They are only exhibits of the facts shown by the evidence. If the court doubted their correctness, he should have had correct statements or tables prepared; but it was not necessary to do this when those offered were proved to be presumptively correct, and there was no showing made that they were incorrect. The court has a sound discretion in determining matters of this sort, in the interest of substantial justice, and we see no error in the admission of the matters in question.

The defendants complain that interest was allowed on the amount found due the plaintiff. In the former case above referred to, of Louisville Bridge Company v. Louisville & Nashville Railroad Company, 106 Ky., 674, 21 R., 271, 51 S. W., 185, it was held not only that the defendant was liable, but that it was liable for interest from the date of the illegal exactions—at least, from the time it had information of the amount due the plaintiff. The chancellor seems to have followed this ruling. As to the cross-appeal of the appellee for the years previous to 1888, there being no record of the amount of tolls paid, we concur with the chancellor in refusing to give relief. The court will not guess at the amount of a judgment. The plaintiff must make out his case. If he can not do it, it is his misfortune that he has no evidence. It is true, we might infer from the facts shown by the record that appellee is entitled to something for these years, yet, after all, it would be a bald guess to fix any amount. But while we are unwilling to disturb the judgment on the cross-appeal, we have no doubt from the record that at least as much was due the appellee as the chancellor entered judgment in its favor for, and that, on the whole case, appellants have no substantial ground of complaint.

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As the bridge company and the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company are not adversary parties herein, their rights as between themselves are not determined.

Judgment affirmed.

Petition for rehearing by appellant overruled.

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DECISIONS

OF THE

Court of Appeals of Kentucky.

SEPTEMBER TERM, 1903.

CASE 21—INDICTMENT AGAINST CHARLES J. BARCLAY FOR PROCURING ONE WITHOUT AUTHORITY TO SOLEMNIZE A MARRIAGE.—SEPT. 24.

Barclay v. Commonwealth.

APPEAL FROM FULTON CIRCUIT COURT.

DEFENDANT CONVICTED AND APPEALS. AFFIRMED.

WRONGFUL SOLEMNIZING OF MARRIAGE—ACCESSORY—INDICTMENT—WIFE TESTIFYING AGAINST HUSBAND—VENUE—EVIDENCE—ADMISSIONS—OPENING CASE—IMPEACHING TESTIMONY.

Held: 1. Under Statutes (1899), section 2110, making it a penitentiary offense for one not authorized to solemnize a marriage under a pretense of having authority, and section 1128, providing that in all felonies accessories before the fact shall be liable to the same punishment as principles, an indictment alleging that one solemnized a marriage between defendant and another, and that defendant procured him to so solemnize it, knowing that he did not have authority, is sufficient.

2. Though Statutes (1899), section 2102, provides that no marriage solemnized before any person professing to have authority therefor shall be invalid for want of such authority, the rule that a wife can not testify against her husband does not apply on prosecution of the man for procuring one without authority to solemnize his marriage, though the woman did not know that the person solemnizing it did not have authority.

3. To show that a mock marriage took place in the State, one who knew the place, but did not know the location of the State line, may testify to having shown it to another, and he may testify to her having shown it to him.

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4. Witnesses may testify to admissions made to them by defendant.
5. Refusal to open the case during the argument, and allow introduction of newly discovered evidence, going only to impeach a witness' testimony, is not an abuse of discretion.
6. Testimony as to what a witness said when persons went to take his testimony, being competent only to contradict his testimony, is not admissible, proper foundation for the contradiction, by his being asked as to the statements, not having been laid.

SAMUEL H. CROSSLAND, FOR APPELLANT.

1. The indictment is defective. The accusative part of it uses the words "wilfully and feloniously," while said words are omitted from the charging part thereof.

2. It does not appear from the indictment but what the marriage ceremony was performed simply as an innocent amusement between the person performing and the defendant and Adeline Chandler, and if it was thus done, no offense was committed.

3. It does not charge conspiracy between the defendant and the one who performed the ceremony, falsely and fraudulently to seduce from virtue and carnally know an unmarried female, by producing a pretended marriage license, and thereby deceiving and cohabiting with her.

4. To make a good indictment it was necessary to charge such facts as were necessary at common law to charge a conspiracy to seduce.

5. It is not sufficient always to follow the language of the statute in setting forth the offense in the indictment.

6. The court erred in admitting Adeline Chandler and Bob Lee Chandler to detail what was said and done by them in the absence of defendant.

7. The court erred in admitting a statement detailed by Dr. Farribo as to what defendant said to him about seeing the young lady and know if she would marry him, as they might put him in the pen.

8. There is no testimony to show that the man who performed the ceremony was not qualified to do so.

9. The court erred in failing to instruct the jury that "a confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such offense was committed."

10. The court erred in refusing to allow defendant to introduce a witness whose evidence was important, and had just been discovered, after the argument of the case had begun.

11. The court erred in not granting the defendant a continu-

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ance. Juries pay no attention to affidavits read as depositions of absent witnesses.

AUTHORITIES CITED.

1. The demurrer to the indictment ought to have been sustained. See Mitchell v. Com., 21 Ky. Law Rep., 222; Wharton's Amer. Crim. Law, 9th ed., vol. 2, sec. 1362; Wharton's Crim. Prac. & Plead., sec. 221, subsecs. 1, 2 and 3; Ky. Stats., sec. 2103; 1 Bishop Crim. Procedure, sec. 277; Tully v. Com., 11 Bush, 158 *et seq.;* The Com. v. McCrory, 3 Ky. Law Rep., 241; Same v. Schurer, 4 Ky. Law Rep., 342; Same v. Greene, 3 Ky. Law Rep., 659; Same v. Stout, 7 B. M., 247; Taylor v. Com., 1 Duv., 161; Com. v. Monarch, 6 Bush, 298; Same v. Monarch, 6 Bush, 301; Ritte v. Com., 18 B. M., 40; Com. v. Kammerer, 11 Ky. Law Rep., 777; Obannon v. Com., 15 Ky. Law Rep., 654; Com. v. Starling & Ramsey, 24 Ky. Law Rep., 492; Same v. Bowman, 16 Ky. Law Rep., 222; see, also, U. S. v. Hess, 124 U. S. (S. C. Rep.), 516; Evans v. United States, 153 U. S. (S. C. Rep.), 831; U. S. v. Carrol, 105 U. S. (S. C. Rep.), 611 (Book 26, 1135); U. S. v. Cruikshank, 92 U. S. (S. C. Rep.), 593 and 594; U. S. v. Walter Mann, 95 U. S. (S. C. Rep.), 531; Darter v. Com., 9 Ky. Law Rep., 277; Richie v. The Com., 23 Ky. Law Rep., 1237.

2. The admission of incompetent evidence. Ky. Stats., secs. 2100, 2102, 2115, also 2105; Bassett v. Bassett, 9 Bush, 697; Robinson v. The Com., 6 Bush, 310; Demarsley v. Fishley, 3 Mar., 368, 369, 370, &c.; Tompert v. Tompert's Exor., 13 Bush, 326; Civil Code of Practice, sec. 635; William E. Bassett v. United States, 137 U. S. (Supreme Court Reports), 762.

3. Failure to give proper instructions. Ky. Stats., sec. 2105; Crim. Code, sec. 240; Cunningham v. The Com., 9 Bush, 149; Patterson v. Com., 86 Ky., 313; Wigginton v. Com., 92 Ky., 282; Kelley v. Com., 21 Ky. Law Rep., 1306; Dugan v. Com., 19 Ky. Law Rep., 1277-8; Bush v. Com., 13 Ky. Law Rep., 425.

H. J. MOORMAN, ATTORNEY FOR THE COMMONWEALTH, 1ST DIST. OF KENTUCKY. C. J. PRATT, ATTORNEY GENERAL, AND McKENZIE TODD, FOR COMMONWEALTH.

1. This is a purely statutory offense, and is not an act fixing a punishment to a common law offense, and in such a case it is only necessary in defining the offense to follow the language of the statute, and in a statutory offense it is not necessary to charge that the act was done "wilfully and feloniously."

2. Adeline Chandler was a competent witness because she was not the wife of the defendant, the pretended marriage being void, not merely voidable.

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3. It is manifest from the evidence heard that the result of the trial would not have been changed if defendant's absent witness had been present.

AUTHORITIES CITED.

Ky. Stats., sec. 2110; Com. v. Carter, 15 R., 253, or 94 Ky., 527 and authorities cited; Wharton's Crim. Pleading and Prac., 9 ed., sec. 231; Mitchell v. Com., 10 R., 911; Paynter v. Com., 21 R., 1562; Hinkle v. Com., 23 R., 1989; Com. v. C. & O. R. R. Co., 19 R., 329; Com. v. Turner, 8 Bush, 2; Com. v. Schurer, 4 R., 312; sec. 6, art. 1, chap. 47, Rev. Stats.; sec. 1960, Ky. Stats.; sec. 2106, Ky. Stats.; Com. v. 7 B. M., 2; Com. v. Bell, 17 R., 277; Howard v. Com., 17 R., 1195; Conner v. Com., 13 Bush, 261 and 2; Com. v. Slaughter, 12 R., 893; Com. v. Benge, 13 R., 591; Com. v. Greenwell, 8 R., 609; Com. v. Smithers, 8 R., 602; Ky. Stats., sec. 1338; Wharton's Crim. Law, 9th ed., sec. 1672 to 1675, inclusive; Higgins v. Com., 14 R., 730; Cundiff v. Com., 9 R., 537; Ky. Stats., sec. 2097; sec. 2, chap. 47, p. 42, 2 vol., Rev. Stats.; Estill v. Rogers, 1 Bush, 63; Stewart v. Munchandler, 2 Bush, 279; Jane Ewing v. Elizabeth Bibb, 7 Bush, 556; 1st ed. Am. & Eng. Ency. of Law, 14th vol., 485; Tompert's Exrs. v. Tompert, 13 Bush, 327; Dugan v. Com., 19 R., 1277; Patterson v. Com., 86 Ky., 313; Wigginton v. Com., 92 Ky., 282; Gilbert v. Com., 23 R., 1094; Keelin v. Com., 84 Ky., 354; Adkins v. Com., 17 R., 1092.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

The first question made in this case is as to the sufficiency of the indictment. The charging part of the indictment is in these words: "In the said county of Fulton, on the first day of September, 1902, and before the finding of this indictment, some man whose name to this grand jury is unknown did, without authority, solemnize a marriage between Charley Barclay and Adeline Chandler, under pretense of having authority to do so, and that Charley Barclay at the time being present, and well knowing that said man, whose name to this grand jury is unknown, did not have authority to solemnize a marriage, did counsel, advise, procure, persuade, command, cause, hire, aid and abet the said man, whose name to this grand jury is unknown, and

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who was not authorized to do so, to solemnize a marriage between him the said Charley Barclay and Adeline Chandler, under pretense of having authority, against the peace and dignity of the Commonwealth of Kentucky."

The indictment is found under section 2110, Kentucky Statutes, 1899: "If any person not authorized shall solemnize a marriage under pretense of having authority, . . . he shall be confined in the penitentiary not exceeding three years." Section 1128, Kentucky Statutes, 1899, also provides: "In all felonies accessories before the fact shall be liable to the same punishment as principals and may be prosecuted jointly with principals or severally, though the principals be not taken or tried unless otherwise provided in this chapter."

The indictment follows the statute. Ordinarily an indictment for a statutory offense is sufficient if it follows the statute. It was not necessary to state in the indictment a conspiracy between Barclay and the person performing the ceremony to seduce the woman under a mock marriage, according to the common-law precedents, for the statute has created a new offense. Nor was it essential to set out what pretense of authority was made by the person who performed the ceremony. To require this would be to add to the words of the statute, and to make a conviction impossible in many cases provided for by the statute. We therefore conclude that the indictment was sufficient.

The court allowed Adeline Chandler to testify against appellant on the trial, and of this he complains also. Section 2097, Kentucky Statutes, 1899, declares a marriage void when not solemnized or contracted in the presence of an authorized person or society. But section 2102 provides: "No marriage solemnized before any person pro-

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fessing to have authority therefor shall be invalid for the want of such authority, if it is consummated with the belief of the parties or either of them that he had authority and that they have been lawfully married."

It was shown on the trial that after the pretended marriage appellant took the woman into the State of Tennessee, and there lived with her a week as his wife, she supposing that they had been regularly married. It is insisted for appellant that, as the marriage had been consummated with the belief on her part that they had been lawfully married, it was by the terms of the statute not invalid for want of authority in the person solemnizing it, and that therefore Adeline Chandler was appellant's wife, and so could not testify against him. We can not concur in this conclusion. The case falls within one of the well-settled exceptions to the rule that a wife can not testify against her husband. In 1 Greenleaf on Evidence, section 343, it is said: "To this general rule excluding the husband and wife as witnesses there are some exceptions, which are allowed from the necessity of the case, partly for the protection of the wife in her life and liberty, and partly for the sake of public justice. But the necessity which calls for this exception for the wife's security is described to mean, 'not a general necessity, as where no other witnesses can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed, without remedy, to personal injury.' Thus a woman is a competent witness against a man indicted for forcible abduction and marriage, if the force were continuing upon her until the marriage, of which fact she is also a competent witness, and this by the weight of the authorities, notwithstanding her subsequent assent and voluntary cohabitation, for otherwise the offender would take advantage of his wrong."

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Other authorities might be cited, but the principle is so well settled that we deem it unnecessary. If the rule were otherwise, it would be in the power of the defendant by consummating the marriage, and thus adding another wrong to the crime he had already committed in procuring the mock marriage, to protect himself from punishment for the crime.

We see no substantial error in the admission of evidence. It was proper to allow Adeline Chandler and Bob Lee Chandler to testify as to the place she showed him as the spot where the mock marriage took place, for this was done to show that it took place in Kentucky, and not in Tennessee, as she did not know the location of the State line. The evidence of Dr. Farribo and others as to the statements made to them by Charley Barclay was competent, for the admissions of the defendant may always be given in evidence, and it was a question for the jury what weight they would give to them. There was nothing in the case calling for an instruction, under section 240 of the Criminal Code of 1889, to the effect that a confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such offense was committed. There was other proof that the offense was committed, and there was no confession of the defendant proven on the trial; the statements proved to have been made by him were simply admissions which were more or less inconsistent with his testimony on the trial.

We do not think that the circuit judge abused a sound discretion in refusing to open the case during the argument, and allow the newly discovered evidence to be given, which only went to impeach Adeline Chandler's testimony.

The testimony as to what Bill Clark said when they went to take his deposition should not have been admitted, as

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this evidence was only competent for the purpose of contradicting his testimony, and proper foundation was not laid for the contradiction, as he had not been asked as to these statements. But Bill Clark was shown to be so sick at this time that we do not think the jury could have paid any attention to his saying under the circumstances that he would not tell anything and didn't know anything to tell, adding that he did not know whether he would live three days. He looked then like he was liable to die any time. And besides, Bill Clark was otherwise successfully impeached.

While the evidence is conflicting, we can not reverse on facts. Judgment affirmed.

CASE 22—PROSECUTION AGAINST DAVID BROWNING FOR CRIMINAL LIBEL. —SEPT. 25.

Browning v. Commonwealth.

APPEAL FROM WEBSTER CIRCUIT COURT.

DEFENDANT CONVICTED AND APPEALS. AFFIRMED.

LIBEL AND SLANDER—CRIMINAL RESPONSIBILITY—WORDS IMPUTING DISPOSITION TO COMMIT CRIME—PRIVILEGED COMMUNICATIONS.

Held: 1. A written communication charging that a certain person would purloin a printing outfit if he had a chance at it, being calculated to bring him into contempt in the community in which he lives, is *per se* actionable, and sufficient to support an indictment for criminal libel.

2. A written communication charging that a certain person would purloin a printing outfit if he had a chance, and requesting the addressee to protect it, can not be held privileged without the showing of any facts which reasonably induced the writer to believe his property was in danger, or any necessity for his communication in reference thereto.

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LOCKETT & LOCKETT, FOR APPELLANT.

POINTS AND AUTHORITIES.

It is not libelous to write of another that he *will purloin* property if he has a chance at it. Townsend on Libel and Slander, sec. 161; Fanning v. Chase, 17 R. I., 388 (Am. St. Rep., 878), and cases therein cited; 13 L. R. A., 135.

Words must be false to be defamatory. Townsend on Libel and Slander, sec. 71. How can a prediction that a man *will* do something be proved to have been true or false?

The alleged libelous letter was from one interested in a newspaper outfit to another who had charge of it, and advises the latter that he would be looked to for its safety. Such a letter is conditionally privileged, and the court erred in telling the jury they could infer malice from the intentional sending of the letter. Hart v. Reed, 1 B. M., 166; Nichols v. Eatin, 110 Iowa, 509 (80th Am. St. Rep., 319).

The indictment is bad because it does not set out the entire letter. Townsend on Libel and Slander, sec. 137.

C. J. PRATT, ATTORNEY GENERAL, AND M. R. TODD, FOR APPELLEE.

A statement in a private letter that "B. will *purloin* all the outfit if he has a chance at it, so I will look to you to protect it for the present," is a criminal libel. The word "purloin," used in this letter, means literally to take or carry away for one's self; hence, to steal, to take by theft.

Defamation is a false publication regarding another to the injury of his reputation. The intent or motive with the words are used, is, as a rule, irrelevant. The party is presumed to have intended the natural consequences of his act.

Defendant claims that this was a private letter, and should be treated as a qualified privilege, and the court in its instructions required the jury to believe to the exclusion of a reasonable doubt that the words were false and maliciously published and written.

To constitute a publication the libel need not be made known to the public generally. It is enough if it be made known to a single third person.

CITATIONS.

Duncan v. Brown, 54 Ky., 158; Odgers on Libel and Slander, 5, 120, p. 93, 94; Cooley on Torts, 204; Fanning v. Chase, 17 R. I., 388; 94 Am. Dec., 455; Lawson on Rights, Remedy and Practice, vol. 3, 1223; Hart v. Reed, 1 B. M., 166; A. & Eng. Ency. of Law (vol. 18), p. 318.

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OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—AFFIRMING.

The appellant, David Browning, prosecutes this appeal from a judgment for $85 rendered against him in the trial of an indictment for criminal libel, which was based upon the following words in a letter written by the appellant to one L. C. Newman concerning George Beard, viz.: "You never answered my letter and I have since learned that you have gone to work for Beard. Don't let the type and outfit of the Banner get scattered until the 28th, when we can do something with it. Did Thompson pay you $75.00? Beard will purloin all of the outfit if he has a chance at it, so I will look to you to protect it for the present."

The first and most important question presented by the record for decision is whether in law the communication upon which the indictment was based should be deemed libelous. It is insisted for appellant that the words, "Beard will purloin all of the outfit if he has a chance at it," are not a libel, because they do not charge that he has actually purloined, but are the mere expression of an opinion on the part of the writer as to what Beard would do if an opportunity presented itself; that it is indispensable that the words, whether spoken or written, should charge "an act done or a condition existing;" that, if they merely charge that the party referred to will do a dishonorable or criminal act, that is not a defamation for which action will lie. It seems well settled in the law of slander that words which only imply a purpose or intention on the part of the person spoken of to commit a crime, or describe him as possessing a disposition, or as wanting in qualities, which would permit him to commit a crime, or amount to a charge that, if opportunity offers, he would commit it, are not *per se* actionable. See Newell on Defamation, Slander and Libel, section 101: 1 Starkie on Slander, 24; Townshend

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on Slander and Libel, 162; Bays v. Hunt, 60 Iowa, 251, 14 N. W., 785; Fanning v. Chase, 17 R. I., 388, 22 Atl., 275, 13 L. R. A., 134, 33 Am. St. Rep., 878. But the law makes a clear and well-defined difference between spoken and written words. It does not require the imputation of a crime to render a publication libelous. Any defamatory words calculated to degrade or injure the reputation of a person in society, when written and published maliciously, are libelous. Riley v. Lee, 88 Ky., 603, 11 R., 586, 11 S. W., 713, 21 Am. St. Rep., 358; Allen v. Wortham, 89 Ky., 486, 11 R., 697, 13 S. W., 73. And the law is equally well settled that, where a defamatory libel on the character of an individual will support an action for damages, the publication amounts to an indictable offense, inasmuch as it tends to provoke violence and disturb the peace of society. 1 Starkie, 211. In Duncan, etc. v. Brown, 54 Ky., 186, it was held *prima facie* libelous to write and publish of one "that he would put his name to anything that another would request him to sign that would injure a third person." In this case there was no charge that the plaintiff had actually committed a crime, but there was, in effect, a charge that he could be made the tool of other persons to injure the plaintiff. This distinction between slander and libel is very clearly defined in A. & E. Ency. of Law (2d Ed.), vol. 18, p. 918, in these words, viz.: "Oral words which do no more than imply a purpose or intention on the part of the person spoken of to commit a crime . . . are not slanderous *per se*. But it is otherwise when the words are written, and it is well settled that written words which import that another intended to commit a crime, or that he had a criminal disposition, are actionable without proof of special damages." See numerous cases cited in note to support text. We think it is impossible to escape the

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conclusion that the words on which the indictment is grounded in effect charge that Beard, if opportunity offered, would steal the printing outfit, and such a charge was certainly calculated to bring him into odium and contempt in the community in which he lived; and they were, therefore, *per se* actionable, and sufficient to support the indictment.

Appellant's next contention is that the extract from his letter which is made the basis of the charge clearly shows that a confidential relation existed between himself and Newman, and that it was written with the sole intention of having him guard certain property which he had intrusted to him from the rapacity of Beard, and was privileged. A privileged communication has been defined as one made upon a proper occasion, from a proper motive, in a proper manner, and based upon reasonable or probable cause. In such cases there is no *prima facie* presumption of malice from the publication. There must be some evidence beyond the mere fact of publication. It may be intrinsic from the style and tone of the communication. If it contains expressions which exceed the limits of privilege, such expressions are evidence of malice. Or it may be extrinsic, as by proof of actual malice, or that the statement was knowingly false, or that it was made without probable cause, or in any way that fairly and reasonably tends to overcome the *prima facie* presumption of protection under the privilege. The immunity of a privileged communication is an exception. The general rule is that nothing but proof of its truth is a defense of a libel, and he who relies on an exception must prove the fact necessary to bring himself within it. Actual malice can rarely be proven, and the only chance for redress for the plaintiff is ordinarily the want of probable cause in the

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publication. It therefore follows that the defendant must show the information on which he relies in the publication to show probable cause. In this case the defendant has not attempted to show any facts which reasonably induced him to believe that his property was in danger from Beard, or any necessity for his communication on this point to Newman. And it is well-settled law that, if the matter charged as libelous be false, and the publication malicious, it can not be privileged. The instructions in this case submit this question to the jury, and they have found against the appellant.

It follows that the judgment must be affirmed.

CASE 23—ACTION BY VALLANDINGHAM & GENTRY AGAINST THE CONTINENTAL INS. CO., &C., ON A POLICY OF FIRE INSURANCE.—SEPT. 25.

Continental Insurance Co. v. Vallandingham & Gentry.

APPEAL FROM OWEN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFFS AND DEFENDANTS APPEAL. AFFIRMED.

FIRE POLICY—ADJUSTMENT OF LOSSES—STIPULATION FOR APPOINTMENT OF APPRAISERS—CONSTRUCTION—VALIDITY—WAIVER.

Held: 1. Where a fire policy stipulates that the ascertainment of the amount of a loss shall be made by the insured and the insurer, and, if they differ, then by appraisers, there must be a real difference before a demand for appraisers can properly be made, and the act of the insurer in merely declining to pay the sum fixed in the itemized account of the insured is not a disagreement.

2. The stipulations in a fire policy that if the insured and insurer differ in estimating the amount of a loss, appraisers shall be appointed, and that no suit shall be brought on the policy until after full compliance by the insured of the foregoing require-

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ments, are valid, and the failure of the insured without good excuse to submit the adjustment of the loss to appraisers is a good defense to a suit on the policy.

3. The stipulations in a fire policy providing for the adjustment of the amount of a loss, if the insured and insurer differ, by appraisers, and prohibiting a suit on the policy until the insured has complied with the foregoing requirement, are inserted wholly for the protection of the insurer, who will not, therefore, be allowed to use them oppressively or in bad faith.

4. Where a fire policy stipulates for the adjustment of the amount of a loss, in case the insured and insurer differ, by "two competent and disinterested appraisers," the insured and insurer each selecting one, and the two electing a competent and disinterested umpire, the insurer, by selecting as one appraiser a partisan willing and anxiously persistent in serving the insurer's interests, waives the appraisal by appraisers, and the insured may decline to renew the arbitration at the hands of such appraiser or any other.

CHAS. STROTHER, JOHN S. GAUNT, FRANK C. GREEN AND BARGER & HICKS, ATTORNEYS FOR APPELLANT.

(No original brief for appellant in the record.)

LINDSAY & BOTTS AND W. S. PRYOR, FOR APPELLEES.

PROPOSITIONS AND AUTHORITIES.

1. The conditions of forfeiture in a policy of insurance, as indeed the entire instrument, are to be construed most strongly against the company. The company prepares it and is familiar with its details, and many conditions. Its ambiguities are to be resolved against the company; and must be liberally construed in favor of the insured, and when words are without violence susceptible of two interpretations, that which will cover the loss must in preference be adopted, the rule being to avoid a forfeiture. Text-book authorities: May on Insurance (2d ed.), secs. 174, 175, 176 and 367; Wood on Insurance, sec. 61. Kentucky authorities: Mutual Benefit Life Ins. Co. v. First Nat. Bank, 24 R., 580; Phoenix Ins. Co. v. Spiers & Thomas, 79 Ky., 294; American Accident Co. v. Rugert, 94 Ky., 580; American Central Ins. Co. v. Hughes, 22 R., 1549; American Central Ins. Co. v. Heaverin, 18 R., 190. Authorities of other States and United States courts: Calton v. Springfield Fire Ins. Co., 1 Sumn. (U. S.), 434; Dow v. Hope Ins. Co., 1 Hall (N. Y.), 174; Lamb v. F. C. Bluff Ins. Co., 70 Iowa, 228; Hoffman v. Aetna F. Ins. Co., 32 (N. Y.), 405; Western Ins. Co. v. Cropper, 32 Pa. St., 351; Riply v. Aetna Ins. Co., 29 Barb. (N. Y.), 552;

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Westfall v. Hudson River F. Ins. Co., 2 Dun (N. Y.), 490; Loud v. Citizens' Mut. Ins. Co., 2 Gray (Mass.), 221; Galveston Mfg. Co. v. Howard F. Ins. Co., 5 Gray (Mass.), 497; Albion Lead Co. v. Williamsburg Ins. Co., 2 Fed. Rep., 479; Sayles v. N. W. Ins. Co., 2 Curt (U. S.), 612.

2. The provision in the policy, "in the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when an appraisal has been required," is not a condition precedent. Bergman & Co. v. Commercial Union Ins. Co., 12 R., 942; Sun Mutual Ins. Co. v. Crist, 19 R., 308; Chenowith v. Phoenix Ins. Co., 12 R., 232; Bodenfield v. Massachusetts M. A. Co., 13 L. R. A., 263. Authorities upon those conditions of the policy which rest and abide upon the same basis as the above condition: Scottish Union & National Ins. Co. v. Strain, 24 R., 958; American Central Ins. Co. v. Heaverin, 16 R., 95; Citizens' Ins. Co. v. Crest, 22 R., 47; Niagara Fire Ins. Co. v. Heflin, 22 R., 1212; Mechanics' & Traders' Ins. Co. v. Floyd, 20 R., 1538.

3. The provision in the policy that "in the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire," coupled with the provision that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity, until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire;"

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"this company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required," is a condition which is absolutely void, null and of no effect.

(a) It is contrary to the law of appraisal under laws of Kentucky, viz.: Civil Code, sec. 451; Ky. Stats., secs. 69, 70, 71, 72 73; Germania Ins. Co. v. Rudwig, 80 Ky., 223; Imperial Ins. Co. v. Kiernan, 83 Ky., 471; Mutual B. L. Ins. Co. v. Davies' Exrs., 87 Ky., 547.

(b) It ousts the courts of their jurisdiction on the subject of appraisal as provided in the statutes and code, supra.

(c) It is intended to, and does, oust the courts of their jurisdiction, and goes farther—it substitutes a tribunal to be erected by the parties (really the company) is against public policy and void. Story's Equity Jurisprudence, sec. 670; May on Insurance, sec. 492; Leach v. Republic Ins. Co. (N. H.), 9 Rep., 181; Street v. Rigby, 6 Ves., 815, 818; Thompson v. Charnock, 8 T. R., 139; Connor v. Drake, 1 Ohio St., 168; Waters v. Taylor, 15 Ves., 10; Home Ins. Co. v. Mass., 20 Wall., 445; Wellington v. Mackintosh, 2 Atk., 569.

(d) It places the court in the very awkward position by compelling the parties to come into court for the purpose of having decided the question. Shall we keep each other out of court?

(e) It does not, and it should not, prevent an adjustment in court of competent jurisdiction. German-American Ins. Co. v. Etherton, 41 N. W. Rep., 406.

4. While still insisting that the provision in the policy relative to an appraisal is not a condition precedent nor is it a condition, any violation of which could furnish the appellants any defense whatever, yet, if this court should so hold, it by no means follows that the judgments are erroneous, for that the obligation, if any resting upon the appellees was waived by the appellants in the following respects, viz.:

(a) "Before the appellants could insist upon any such condition they must show that they *admitted* the validity of the policy and their *liability* under it, and that the *only* question open between the parties was the question of damages." Wood on Insurance, sec. 430, p. 718; Hickerson v. German-American Ins. Co., 32 L. R. A., 173; Mentz v. Armenia F. Ins. Co., 78 Penn. St., 478.

(b) A denial of liability waives condition as to appraisal. Ins.

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Co. of America v. Forwood, &c., 12 R., 846; Same v. Same, 13 R., 261; Hickerson v. German-American Ins. Co., 32 L. R. A., 173.

(c) Failure of arbitrators to agree upon an umpire is an abandonment, especially so when the fault is upon the part of the appraiser appointed by the company, and prevents the companies from objecting that the action was brought before appraisal. Brock v. Dwelling House Ins. Co., 26 L. R. A., 623; McCullough v. Phoenix Ins. Co., 113 Mo., 606; Bishop v. Agricultural Ins. Co., 130 N. Y., 488; Uhrig v. Williamsburgh C. F. Ins. Co., 101 N. Y., 362; Bradshaw v. Agricultural Ins. Co., 137 N. Y., 137.

(d) An arbitration having failed by reason of the appraisers having failed to agree upon an umpire, the insured is not bound to enter into a new attempt at arbitration even if the insurers are willing. Chapman v. Rockford Ins. Co., 28 L. R. A., 405; Uhrig v. Williamsburgh F. Ins. Co., 101 N. Y., 362; Bishop v. Agricultural Ins. Co., 130 N. Y., 488; Davenport v. Long Island Ins. Co., 10 Daly, 538, 539; Howard Ins. Co. v. Hocking, 115 Pa., 416.

(e) An appraiser chosen by the insurer can not demand that an umpire be selected who does not live in the vicinity of the property nor one wholly incompetent, and when done is a waiver of the condition. Hickerson v. German-American Insurance Co., 32 L. R. A., 172; McCullough v. Phoenix Ins. Co., 113 Mo., 606; Niagara F. Ins. Co. v. Bishop, 154 Ill., 9; Uhrig v. Williamsburgh C. F. Ins. Co., 101 N. Y., 362; Chapman v. Rockford Ins. Co., 89 Wis., 572; cases cited under (d).

(f) The appraiser for the insurer must be free from bias as must also be the appraiser for the insured, but when it is shown and known that the appraiser for the insurer was not free from bias, but was not only willing for the companies to misrepresent the facts as to him, but did himself so do he was not in law an appraiser and therefore the company not having selected an appraiser can not demand an appraisal. Chapman v. Rockford Ins. Co., 89 Wis., 572; Brock v. Dwelling House Ins. Co., 102 Mich., 583.

(g) After the appraisers failed to select an umpire the fact that the adjuster for the appellant companies did then and there demand of the appellees that they make out and furnish to each of the appellant companies an itemized list showing sound value and loss of each and every article, knowing that so to do required much time, expense and loss, and which was done was a waiver of the condition to arbitrate. Pretzfelder v. Merchants' Ins. Co., 44 L. R. A., 424; 123 N. C., 164; Manhattan Ins. Co. v. Stien, 5 Bush, 657; Aetna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.), 85; Bodle v. Chenango C. M. Ins. Co., 2 Comst. (N. Y.), 53;

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St. Louis Ins. Co. v. Kyle, 11 Mo., 278; O'Niel v. Buffalo F. Ins. Co., 3 Comst. (N. Y.), 122; Clark v. New England Ins. Co., 6 Cush. (Mass.), 342; Ins. Co. v. Connor, 5 Harris (Pa.), 136; McMasters v. West Chester C. M. Ins. Co., 25 Wend. (N. Y.), 383; Hibernia Ins. Co. v. Meyer, 39 N. J., 482; Mercantile Ins. Co. v. Holthaus, 43 Mich., 423; Planters' Ins. Co. v. Deford, 38 Md., 382; Tisdale v. Mut. Benefit Ins. Co., 91 U. S., 238; Mason v. Citizens' Ins. Co., 10 W. Va., 572; Madsden v. Phoenix Ins. Co., 1 S. C., n. s., 24.

(h) The appellants having in their several answers denied all the allegations of the petition, especially all liability and all damage, any and all objections as to the arbitration clause of the policy became and was thereby waived. Hicks v. British America A. Co., 162 N. Y., 284; 32 L. R. A., 424; White v. Middlesex R. Co., 135 Mass., 216; Horton v. Sayer, 4 Hurlst & N. 643; Lee v. Page, 30 L. J. Ch., 857; Edwards v. Aberayron Mut. S. Ins. Soc., L. R. Q. B. Div., 563.

REPLY BRIEF BY ATTORNEYS FOR APPELLANT.

The learned counsel for appellee, who for the first time appeared in this case in this court, was doubtless impressed with the fact that the damages claimed by appellees, and for which judgment was rendered in the lower court, was somewhat extravagant, to say the least of it, when he was confronted with the fact that this was a stock of goods and merchandise in a small country store, in a small country town or village of only thirty or forty people, where merchants as a general thing would not think of carrying stock of goods, &c., of greater value than five or six thousand dollars; the trade, the business, would not justify more, but when he realized that this was not a claim for the destruction of the goods or any part thereof, but only for the damage to this stock by moving it out of the house across the street and carrying back again, no damage by fire or water used in putting out the fire, he felt called upon both in his written brief and oral argument to labor the question as to the value of the goods and the amount of damage. Counsel was also doubtless impressed with the peculiar circumstances and the peculiar relationship existing between the parties Vallandingham & Gentry, and the parties they selected to appraise, arbitrate and umpire this matter.

Counsel for appellees did not tell the court that Boerner, the man they selected first as appraiser lived within three or four miles of this store and in partner with Alexander; also running a country store, playing magistrate and trading generally. Whether he carried the same amount of insurance, in proportion

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to the amount of goods that Vallandingham did, the record does not show. Nor did counsel say anything about the fact that Boerner went over to the appellee's store after the night of the fire and actually, in connection with Hill & Wood, who came from Carrollton, some fifteen or twenty miles, in another county, agreed on an amount of damage and stated in writing what they would do or say as to the amount of damage, and gave said writing to appellee; nor did counsel for appellees tell you that afterward when the insurance companies demanded that the question as to the amount of damage should be settled by arbitration that the appellees selected as their arbitrator Mr. Boerner, this man who had so interested himself as to come over from his place and agree with Vallandingham & Gentry as to what he would say the damage should be, nor did the counsel for appellees tell the court that when the insurance companies sent their adjuster alone to meet with the appellees and together with the arbitrator selected by the companies and Mr. Boerner, this disinterested arbitrator and appraiser selected by the appellee that the appellee appeared at that time and place, not only in person but by attorney; that the appellee had actually then employed a skillful and artful attorney and had him there on the ground to manage, control and direct what should be done, nor did the counsel for appellee tell the court that when the appellees were called on as per agreement to select or indicate the name of some disinterested, impartial, unbiased, good man who had no opinion in the matter or any bias at all, these appellees, or rather their chosen arbitrator, Boerner, suggested the names of Hill and Wood, and his partner, Alexander, the very men who had come voluntarily, or at least had come before this, some fifteen or twenty miles and together with him had already not only agreed as to what they would say and do, but had stated it in writing to these appellees, all of which was at that time unknown to these appellants or their adjuster or appraiser; nor did the counsel for appellee tell you why or give any explanation why it was that Hill and Wood were selected and brought or came from Carrollton beforehand to where these goods were in order to qualify themselves either as arbitrators or umpires, nor has any explanation been given as to why they were required to give to appellees a written statement as to what they thought ought to be done as regards the amount of damage, or what they would do, nor has any explanation been given as to why this examination and inspection was secretly made (so far as appellants are concerned) by Boerner, Hill & Wood and the secret guarded so well that the appellants nor their adjuster did not know anything about it until these names were suggested,

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and before accepting, the adjuster made inquiry and learned from outsiders that such was the fact. There were several good men, storekeepers, well qualified to estimate and fix the value and amount of damages, much nearer the place where these goods were than Hill and Wood. Why were not some of these selected and why were they rejected when suggested by the appellants for umpire, and what explanation has been given why judgment in this case was rendered for the extreme amount, in fact, the whole amount claimed over $4,000, when, in addition to the facts and circumstances proven and not denied, showing that it is contrary to custom and in conflict with the experience of men in a little hamlet or village to carry a stock of goods or merchandise of any such value as claimed by appellees, but it is actually proven that the said stock of goods, &c., was not damaged more than $500 or $600, if that, and the whole lot of goods not of greater value than $5,000 or $6,000? So it is incumbent upon my distinguished friends, the counsel for appellees, to show or explain how it is that such an amount of damage has been sustained by the carrying out and taking back said stock of goods, wares, &c., even if it rained when so much of the stock was composed of articles (harness, hardware, &c.), that could not have been seriously injured.

We now call the attention of the court to all these facts as shown by the record, some that there is really no dispute about, viz.: That this was a stock of goods, wares and merchandise in a small village of only thirty or forty people; that there were a number of country stores similar to this situated within five or ten miles of this store, and that usually merchants in country towns and stores like this carry stock of not greater value than $5,000 or $6,000; that this stock was composed of hardware, harness, dry goods, but the dry goods consisted in greater part of overalls and goods that as a general thing would not be seriously injured or damaged by rain and that not an article was burnt, destroyed or injured by the fire in any way, or any water used in putting out the fire, no articles were even lost, but the whole damage claimed is such as was sustained in carrying the stock out of the building a short distance across the street and then carrying it back; while the stock was being carried back there was a sprinkle of rain, not what we ordinarily call a shower, but a drizzle, not enough to wet the goods and do any serious damage.

Now the counsel for appellants insist that in the very nature of the case it was utterly impossible for the stock to have been damaged or injured to anything like the amount claimed, and when you consider these facts and circumstances in connection with the sworn statement of the witness who examined thor-

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oughly the stock after the fire and who says that the whole damage would not exceed five or six hundred dollars, we do not believe this court will hesitate to say that the judgment rendered by the lower court was not only exorbitant, but that it is an outrage on the interest of these appellants, and should be set aside for that reason, if for no other.

If the appellees had any standing in court, if there were no conditions in the policy to be complied with which preceded their right to file suit, or if they had complied fully with all the conditions, yet we insist that this judgment should not be permitted to stand and the appellees reap a clear profit of at least $3,000 or $3,500 simply because these several insurance companies are the parties on one side and the appellees, Vallandingham & Gentry, country merchants, with a lot of relations and friends living in the county of Owen and adjacent counties, are on the other side.

We insist that a fair administration of justice as between these parties not only authorizes, but demands that this judgment should be set aside.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

Appellees effected an insurance for $6,000 with appellants, six fire insurance companies, upon a stock of general merchandise at Wheatley, Ky. By the reason of the burning of an adjacent building, threatening the one containing the insured goods, appellees removed the goods into the street and to a nearby lot. In the excitement, hurry, and reckless manner of handling by the crowd the goods were badly damaged by being soiled and otherwise abused. These suits are to recover the amount of the damage, laid at $4,000. The principal defense is that the insured failed and refused to submit the amount of their loss or damage to arbitration or appraisement, as required by the policies. All the policies are alike in this particular. Their form is what is known as the "New York Standard Policy." The clause in question is as follows: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual

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cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or if they differ, then by appraisers as hereinafter provided, and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. . . . In the event of disagreement as to the amount of the loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser selected by them and shall bear equally the expenses of the appraisal and umpire. . . . And the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. . . . No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements. . . . This policy is made and accepted subject to the foregoing stipulations and conditions." The fire occurred on the night

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of November 1st. The insurance companies were promptly notified of the loss, and sent adjusters. Failing to agree upon the amount of the loss, on December 7th following the insurers and the insured entered into an "agreement for submission to appraisers," the material part of which, so far as affects the question now in hand, is as follows: "This agreement made and entered into by and between Vallandingham & Gentry, of Wheatley, Kentucky, of the first part, and the insurance company or companies whose name or names are signed hereto, of the second part, each for itself and not jointly, witnesseth, that C. G. Boerner and T. J. Boyd shall appraise and ascertain the sound value of and the loss upon the property damaged and destroyed by the fire of November 1, 1900, as specified below. Provided, that the said appraisers shall first select a competent and disinterested umpire, who shall act with them in matters of difference only. The award of any two of them, made in writing, in accordance with this agreement, shall be binding upon both parties to this agreement as to the amount of such loss. It is expressly understood that this agreement and appraisement is for the purpose of ascertaining and fixing the amount of sound value and loss and damage only to the property hereinafter described, and taken into consideration every article on schedule attached hereto, whether totally or partially destroyed, and is to be in settlement of the entire loss, and shall not determine, waive or invalidate any other right or rights of either party to this agreement." Boerner was selected by the insured, and Boyd by the insurers. Boerner was a merchant living in a village some few miles from Wheatley. Boyd was a merchant living at Columbus, Ohio. The arbitrators spent most of the day of December 7th in trying to agree upon an umpire, but failed. All names then proposed by each

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were rejected by the other. About 2 or 3 o'clock in the afternoon Boerner announced that they were unable to agree on an umpire, and signed an indorsement to that effect on the appraisal agreement. Boyd did not sign it, but did not then offer to make further effort toward an agreement. Boyd and the adjuster for the insurance companies left together. That evening, after they had arrived at the railroad station some miles from Wheatley, Boyd wrote to Boerner, offering to reopen the matter. Boerner responded some days later that he had nothing more to do with it, and that the insured had opened their store (which had been kept closed since the fire), and begun selling the goods, and that it was, therefore, impossible to make an appraisal. Later Boyd offered to Boerner to accept as umpire one of the persons whom Boerner had offered at the first meeting. Boerner peremptorily declined to act further. The insurers wrote, in answer to letters from the insured inclosing the proof of the loss and itemized statements thereof, insisting that Boyd and Boerner should continue to act as arbitrators, and should complete the appraisal as provided in the agreement of December 7th. This was refused by the insured. No other specific objection was made or intimated as to the amount of damage claimed, or touching any item of it. The companies refused to pay, because of the failure to have the appraisal made, and these suits followed.

It is not clear that appellants were entitled to an arbitration under their contracts in this case. The policies provide that the amount of loss or damage was to be fixed by the agreement of the parties, and only in event of a difference was there a right to demand an appraisal. The insured promptly furnished complete itemized statements, showing in detail the values claimed by them, and the

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amount of loss or damage asserted. Whether the articles were fairly valued in their sound condition was a matter easily enough to be ascertained by those familiar with the markets of such goods. It does not appear that appellants' adjuster ever expressed an opinion or made such an examination as would warrant it, before his testimony in this suit, that could be made the basis of intelligent action by the insured. A general proposition to pay so much in the aggregate smacks more of a proposition to compromise than one to compensate. Arbitrarily rejecting the insured's estimate without an earnest intention and effort to make a settlement upon the basis first fixed in the policies, in order that vexatious delays and questionable diplomatic advantages might be gained in the matter of arbitrators, to lessen the sum that should be paid for the actual loss, is contrary to both the letter and the spirit of the contract. That the insurers merely declined to pay the sum fixed in the schedule and itemized accounts of the insured is not a disagreement, or differing, as contemplated by the contract, so as to authorize a demand of appraisal. It should have been a real difference, based upon the facts, which should have been candidly and fully submitted for acceptance by the other side. However, in the preparation of this case the parties have treated it as one where the difference between the insured and the insurers had occurred.

Appellees insist that the agreement to submit to arbitration is void. An agreement to submit a possible controversy to arbitration, made before the controversy has arisen, if it involves the determination of the right of recovery, both as to law and facts, is void, because it tends to oust the courts of their jurisdiction, and substitutes a contract tribunal in the stead of the one provided by law for the trial of lawsuits. But the courts have held with marked unan-

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imity that an agreement to submit the determination of some fact involved in a controversy to arbitrators, or to some third person as a referee, is not an invalid provision; and, where the agreement makes the award or finding a condition precedent to a right of action, it is enforceable, in that the failure, without good excuse, to submit the question as provided, is a good defense to a suit upon the contract. Joyce on Insurance, section 3232 *et seq.;* May on Insurance (3d Ed.), section 493; Hamilton v. L. & L. & G. Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed., 419; U. S. v. Robeson, 9 Pet., 319, 9 L. Ed., 142. The arbitration clause in insurance policies issued upon personal property, if lived up to in the spirit that justifies their encouragement by law, is a serviceable method of settling the question of loss or damage. While the facts are yet fresh, and the damaged articles are to be seen, it is reasonable to suppose that impartial men, familiar with the character and value of such goods in that community, can, by personal inspection, and by the use of their judgments and experience, more nearly come to a true valuation than any number of men not on the scene, inexperienced in every probability in the business of valuing such articles, trying to get at the values upon the testimony often of biased or incompetent or careless witnesses. This clause of the policy was inserted wholly for the protection of the insurer. The courts have allowed and encouraged it as an inexpensive and not unjust check upon the danger of overvaluation and fraud by dishonest insured property holders who have sustained loss by fire. But the insurer will not be permitted to misuse this clause oppressively, or in bad faith. To prevent such, when the insurer so misuses it, it ought to be held a waiver by it of that provision.

From the record we find that the person selected by ap-

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pellants as their appraiser had served many times in that capacity before, and as many as three times before for one of the appellants. This fact alone need not be inconsistent with his impartiality. But his conduct throughout this transaction was more like that of an employe than of a disinterested person. That he was brought from such a remote point, at great expense, undoubtedly, to the insurers; that he was willing, and even anxiously persistent, in serving their interests, as a partisan would; that his examination of the injured goods affected his judgment exactly as it did the paid adjuster of the companies, fixing the amount of the damage at $600, when all the other witnesses, many of them apparently disinterested and equally qualified, placed it at $4,000; that he was directed and counseled with by appellants' adjuster, and submitted to him the correspondence and other information gained bearing on the attempt to arbitrate the loss—all convince us that this person did not have the qualification implied in the contract; that is, a discreet, disinterested, impartial man. This fact was evidently known to the insurers or to their adjuster having this settlement in charge. That an improper advantage was sought by them in making this selection is equally evident, if we can accept the judgment and opinion of every other witness in the record, except these two representatives of appellants, concerning the amount of the damage. The evidence of the extent of damage is convincing. An adjuster may be, and ought to be, more competent than the ordinary merchant, and equally as honest, in fixing such valuations. But the great preponderance of the evidence in this case seems to be against the valuation fixed by appellants' adjuster.

We may say in passing that the arbitrator selected by appellees seems to have been equally as partisan as the other.

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But, if a person for whose benefit a clause in a contract is inserted would have the advantage of it, he must bring himself within its terms, and will not be excused because the other party has likewise failed. Unless the insurer asks for the arbitration or appraisal before suit brought, the failure to appraise is not a defense. Sun Mutual Ins. Co. v. Crist, 19 R., 305, 39 S. W., 837; Bergman & Co. v. Commercial Union Ins. Co., 12 Ky. Law Rep., 942; Chenowith v. Phoenix Ins. Co., Id., 232; Scottish Union and National Ins. Co. v. Strain, 24 R., 958, 70 S. W., 274. And when the insurer demands the appraisal, it must in good faith nominate a competent, disinterested person as appraiser, before it can defend upon the ground that the insured has failed to keep that part of his contract. Chapman v. Rockford Ins. Co., 89 Wis., 572, 62 N. W., 422, 28 L. R. A., 405; Brock v. Dwelling House Ins. Co., 102 Mich., 583, 61 N. W., 67, 26 L. R. A., 623, 47 Am. St. Rep., 562. Having once waived the appraisal by its conduct, the insurer can not require that the matter in dispute be again submitted to arbitrators. It was, therefore, within the legal right of appellees to decline to renew the arbitration at the hands of Boyd and another, or any other appraisers. McCullough v. Phoenix Ins. Co., 113 Mo., 606, 21 S. W., 207; Chapman v. Rockford Ins. Co., supra; Uhrig v. Williamsburgh Fire Ins. Co., 101 N. Y., 362; 4 N. E., 745.

The judgment of the circuit court was in conformity to these views, and is, consequently, affirmed.

Petition for rehearing by appellant overruled.

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CASE 24—ACTION BY COMMONWEALTH AGAINST BOB ELKINS TO RECOVER A PENALTY FOR VIOLATION OF LOCAL OPTION LAW.—SEPT. 25.

Commonwealth v. Elkins.

APPEAL FROM TODD CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

PENAL ACTION—INDICTMENT—DISMISSAL—NEW ACTION—LIMITATION.

Held. 1. Statutes, 1899, section 1138, provides that an action of proceeding to recover a penalty for violation of the criminal laws shall be commenced within one year after the right to such penalty accrues, and not thereafter. Criminal Code, section 159, makes it the duty of the circuit judge, on quashing an indictment on grounds specified in section 158, to order the case resubmitted; and section 160 declares that unless a new indictment is found by the next grand jury, the defendants shall be discharged unless the court for cause shall otherwise order. HELD, that where an indictment for violation of the local option law was dismissed more than a year after the commission of the offense without an order for resubmission, a subsequent civil action brought to recover a penalty for the same offense was not a continuance of the original proceeding, but a new action, and barred by limitations.

M. R. TODD, FOR APPELLANT. (C. J. PRATT, OF COUNSEL.)

Appellee was indicted on the 7th day of December, 1901, charged with selling by retail spirituous liquor to Sid Cherry, in the town of Trenton, county of Todd, during the month of May or June, 1901.

On the 16th day of July, 1902, the court entered an order dismissing the indictment.

On the 10th day of November, 1902, a petition was filed in the Todd Circuit Court in the name of the Commonwealth v. Bob Elkins, in which the Commonwealth sought to recover against Elkins the sum of two hundred ($200) dollars and the cost of the action. The lower court sustained a demurrer to the petition and the Commonwealth appealed.

The question presented is whether or not the prosecution was barred by section 1138, Kentucky Statutes.

The above section provides, in part: "Prosecutions by the

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Commonwealth for felony, unless otherwise specially provided, shall not be barred by lapse of time or any law of limitations. Prosecutions by the Commonwealth to recover a penalty for a violation of any penal statute or law, and an action or procedure at the instance of any person to recover any such penalty, shall be commenced within one year after the right to such penalty accrued, and not after, unless a different time is allowed by the law imposing the penalty."

We contend that the statute did not run against the prosecution by petition as long as the indictment was pending. The filing of the petition was a continuation of the prosecution by indictment and was a matter of right vested in the Commonwealth to proceed by petition.

The original action was brought within the time provided in the statute, and section 1138 of the Kentucky Statutes contemplates that the prosecution be brought within one year.

We contend that this section applies to the original prosecution and the indictment having been brought within the time prescribed, it was error upon the part of the lower court to sustain a demurrer to the petition.

We respectfully ask a reversal, with direction to the lower court to overrule the demurrer. 101 Ky., 195; 20 R., 1639.

S. WALTON FORGY, ATTORNEY FOR APPELLEE.

The only question presented in this case is whether or not the alleged crime for which this penal action was brought was barred by the Statute of Limitation. The petition filed by the Commonwealth's attorney in this case shows that it was barred by the Statute of Limitation, and therefore the lower court did not err in sustaining the demurrer filed by the defendant. Section 1138 of the Kentucky Statutes says: "Prosecutions by the Commonwealth to recover a penalty for a violation of any penal statute or law, and an action or procedure at the instance of any person to recover any such penalty, shall be commenced within one year after the right to such penalty accrued, and not after, unless a different time is allowed by the law imposing the penalty." More than one year elapsed after the sale of the whisky complained of in this case and the filing of this penal action.

Appellee respectfully asks for an affirmance of the judgment in the court below.

OPINION OF THE COURT BY JUDGE SETTLE—AFFIRMING.

By the petition in this case which was filed in the Todd circuit court on the 10th day of November, 1902, the appellant, Commonwealth of Kentucky, sought to recover of the

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appellee the sum of $200 and the costs of the action as a penalty under the statute for an alleged violation of the local option law, which appellant is charged to have committed by selling spirituous liquor in the town of Trenton in May or June, 1901. The lower court sustained a demurrer to the petition upon the ground that the action was barred by limitation, and the only question presented for consideration by this appeal is whether or not the prosecution was barred by the statute of limitations. Section 1138 of the Kentucky Statutes of 1899 provides that : "Prosecutions by the Commonwealth for felony, unless otherwise especially provided, shall not be barred by lapse of time, or any law of limitation. Prosecutions by the Commonwealth to recover a penalty for a violation of any penal statute or law, and an action or procedure at the instance of any person to recover any such penalty, shall be commenced within one year after the right to such penalty accrues, and not after, unless a different time is allowed by the law imposing the penalty." It appears from the averment of the petition that appellee was indicted on the 7th day of December, 1901, in the Todd circuit court, for the same offense for which the penalty is sought to be recovered against him in this case. The indictment was allowed to remain on the docket without trial or other action until the 16th day of July, 1902, at which time an order was entered by the court dismissing it without a re-reference to the grand jury. It does not appear from the record that the appellee was ever before the court under the indictment. So, upon the face of the record, it is conclusively shown that more than a year elapsed between the commission of the offense by appellee and the date of the dismissal of the indictment, and the petition in this case was not filed

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until about four months after the dismissal of the indictment, and about seventeen months after the alleged commission of the offense. It is contended, however, by counsel for appellant, that limitation did not run against this action to recover the statutory penalty as long as the indictment was pending, and that the filing of the petition was but a continuation of the prosecution begun by indictment; in other words, that the time during which the indictment was pending should be excluded from the statutory period within which the prosecution or action was required to be commenced. No authority is cited in the brief of counsel in support of this contention, and we apprehend that none can be found. In Commonwealth v. T. J. Megibben Co., 101 Ky., 195, 19 R., 201, 40 S. W., 694, a second indictment was returned against the defendant for maintaining a nuisance, which showed on its face that the offense charged was committed more than a year before the finding of the indictment, but, as the indictment contained the averment that the offense therein charged was the same charged in the former indictment returned in the same court, it was contended for the prosecution that the second indictment was not barred by limitation, but should be regarded as a continuation of the prosecution set on foot by the first indictment; but this court held that a prosecution under the second indictment would not be regarded as a continuation of the former prosecution, so as to avoid the statute of limitations, as it was not alleged in the second indictment that the other indictment had been quashed and the case re-referred to the grand jury, or dismissed by the Commonwealth's attorney and re-referred. Consequently, a demurrer was sustained to the last indictment because of the bar interposed by the statute of limitations. To the same effect was the decision of this court in Tully v. Commonwealth, 13 Bush, 153, and of the

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superior court in N. N. & M. V. R. Co. v. Commonwealth, 14 Ky. Law Rep., 197, and L. & N. R. R. Co. v. Commonwealth, 4 Ky. Law Rep., 627. In no case that we have been able to find has it been held in this State that, where a prosecution for an offense has been commenced by indictment, and the indictment dismissed without a re-reference to the grand jury, a second indictment for the same offense or action to recover the penalty denounced by statute against such an offense is to be regarded as a continuation of the former prosecution, even though such second indictment be found or action commenced within a year after the commission of the offense; and much less can it be so regarded if commenced more than a year from the date of its commission. If an indictment is quashed upon any of the grounds mentioned in section 158, Cr. Code, section 159, makes it the duty of the judge of the circuit court to make an order that the case be submitted to another grand jury, and that the defendant, if in custody, shall be remanded to jail, or required to give bail for his appearance to answer a new indictment, if one be found, at that or the next term of the court.

It is further provided by section 160 that, unless a new indictment be found before the final discharge of the next grand jury, the defendant shall be discharged from custody or bail, unless for good cause the court shall otherwise order. In the state of case thus provided for, if a new indictment be returned against the defendant, though beyond the period fixed by the statute of limitations for the prosecution of one guilty of the offense charged, the prosecution would not be barred by the statute, for the prosecution under the second indictment would be but a continuation of that commenced under the first indictment, the defendant being all the time before the court by virtue of its order

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made at the time of re-referring the case to the grand jury. Section 178, Cr. Code, provides in substance that the dismissal of an indictment by the court on demurrer, or for objection to its form or substance taken during the trial, or for variance between the indictment and proof, shall not bar another prosecution for the same offense. Section 243 likewise provides that, when the indictment is dismissed by the attorney for the Commonwealth with the permission of the court, such dismissal shall not bar a future prosecution for the same offense. While not expressly authorized by sections 178 and 243, we know of no rule of law or practice that would forbid the re-reference to the grand jury of an indictment dismissed as therein provided, or the holding of the defendant in jail or on bond to answer the new indictment that might be found by the grand jury. However, where the dismissal of the indictment results as authorized by sections 178 and 243, and without a re-reference to the grand jury, that body may nevertheless return another indictment against the same defendant for the same offense at any time within the statutory period fixed for the prosecution of such an offense; but it is only where an order of re-reference is made upon the dismissal of the indictment that the return of a new indictment for the same offense by the grand jury will be treated as a continuation of the prosecution begun by the finding of the first indictment. It is not averred in the petition that a re-reference to the grand jury was had upon the dismissal of the indictment against appellee; consequently its dismissal ended the prosecution against him, never to be revived, because the dismissal occurred more than a year after the commission of the offense charged. If the indictment had been dismissed within the year succeeding the commission of the offense, though without a re-reference of the case to the grand jury, another

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prosecution for the same offense might have been instituted against appellee at any time before the expiration of the year thereafter, by indictment, or by civil action, as here attempted; but this case must, in our view of the law, be regarded as an original action, without support from the indictment under which the prosecution against appellant was originated, and, it being shown on the face of the petition that it was not brought within a year next after the right to recover the penalty accrued, viz., of the date of the commission of the offense complained of, it follows that no error was committed by the lower court in sustaining the demurrer and dismissing the petition. Therefore the judgment is affirmed.

CASE 25—ACTION BY F. B. MILLS AGAINST L. & N. R. CO. FOR BURNING RESIDENCE.—SEPT 29.

Mills v. Louisville & N. R. R. Co.

APPEAL FROM LOGAN CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

RAILROADS—ENGINES—SETTING FIRES—SPARK ARRESTERS—BURDEN OF PROOF—INSTRUCTIONS

Held: 1. In connection with other evidence to show that plaintiff's house was set on fire by an unknown passing engine, it may be shown that a few days before a fence as far from the track as the house took fire from sparks from a passing engine.

2. The court should not instruct on burden of proof, but simply frame the instructions so as to indicate on whom it lies.

3. Under Kentucky Statutes, 1899, section 782, requiring railroad companies to equip locomotives with appliances that will prevent, as far as possible, sparks of fire escaping, it is not enough for them to put on safe and approved fire arresters, but they must provide the best and most effectual spark arrester known to science

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and of practical use, properly adjusted, that will prevent as far as possible sparks escaping.

S. R. CREWDSON AND W. P. SANDIDGE, ATTORNEYS FOR APPELLANT.

Appellant's dwelling house and outhouses and some of the contents were destroyed by fire about June 20, 1899, as he claims, by sparks emitted from one of defendant's engines.

Our contention is:

1. That although the house was 171 feet from the railroad track, the evidence shows it was a physical impossibility that the fire should have originated otherwise than from sparks from the train, for these reasons:

(a) The fire was first discovered in the roof on the side next to the railroad track.

(b) A freight train had passed the house a short time before the fire was discovered.

(c) There was a heavy grade on the railroad in the direction the train was going.

(d) A strong wind was blowing at the time from the train in the direction of the house.

(e) Large cinders, and many of them, were found in the direction of and near the house.

(f) Trees and fences were shown to have been set on fire the same day or about the same time by the train, as far away from the track as was plaintiff's house.

2. The court erred in not permitting the plaintiff to prove the following facts:

(a) That a short time after this house was burned, a fence over in the field as far from the track as this house took fire from sparks from the engine.

(b) That a few days before this fire, and near by, fences were set on fire as far away as plaintiff's house from the track, by sparks from the engine and that the defendant paid for the fence.

This evidence was competent for two reasons: (1) That it was possible for a coal or spark from an engine to live long enough to set fire to objects as far from the train as was plaintiff's house. (2) That it was a circumstance showing that defendant's spark arresters were not in good condition or were not properly adjusted.

3. The court erred in its instructions to the jury that the spark arresters should be *suitable* and *approved* and in *reasonably* good condition, when it should have told them that the law required them to be the *best* and *most effectual appliances* for this purpose *in general use*.

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AUTHORITIES CITED.

1. The evidence which was excluded should have been heard. Kentucky Central R. R. Co. v. Barrow, 89 Ky., 643; Sheldon v. The Hudson River R. R. Co., 14 N. Y., 218; Field v. N. Y. C. R. R. Co., 22 N. Y., 339; L. & N. R. R. Co. v. Samuel's Ex., 22 Ky. Law Rep., 303.

2. The instructions were clearly erroneous. L. & N. R. R. Co. v. Samuels' Ex., supra; L. & N. R. R. Co. v. Reese, 7 Am. St. Rep., 66; Burlington, &c., R. R. Co. v. Westover, 4 Neb., 268; Carson v. Milwaukee, &c., Ry. Co., 29 Minn., 12; Illinois Central R. R. Co. v. Mills, 42 Ill., 407; Coats v. Missouri, &c., Ry. Co., 61 Mo., 38; Burk v. Louisville, &c., R. R. Co., 7 Heisk., 451; Case v. North Central Ry. Co., 59 Barb., 644; Spaulding v. Chicago, &c., Ry. Co., 30 Wis., 110; Shearman & Redfield on Negligence, sec. 333; Burroughs v. Housatonic R. R. Co., 38 Am. Dec., 71 (note); 1 Thompson on Negligence, 153.

EDWARD W. HINES AND J. C. BROWDER, ATTORNEYS FOR APPELLEE.

POINTS AND CITATIONS.

1. The excluded evidence as to other fires would have been cumulative merely, and therefore its rejection was not prejudicial.

2. Such evidence was competent only for the purpose of showing that it was possible for escaping sparks to cause the fire, and so even if all that evidence had been admitted there would have been no evidence of negligence. It is only where other fires have been caused by sparks escaping in unusual quantities or of unusual size that they are evidence that the fire in question was caused by defendant's negligence. Ky. Stats., sec. 782; Ky. Cent. R. Co. v. Barrow, 89 Ky., 633; L. & N. R. Co. v. Taylor, 92 Ky., 55; L. & N. R. Co. v. Samuels' Exors., 22 Rep., 303; Sheldon v. Hudson River R. Co., 14 N. Y., 218; Field v. N. Y. C. R. Co., 32 N Y., 339.

3. The burden was on plaintiff to show negligence. (Cases cited above.)

4. A part of the evidence is omitted from the stenographer's transcript, and for that reason the judgment should be affirmed.

5. The errors, if any, in instructions were harmless.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

Appellant's residence was destroyed by fire in June, 1899, and he filed this action to recover damages therefor of the appellee on the ground that the fire originated from a spark

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emitted from one of its engines. On the trial of the case the jury returned a verdict in favor of the defendant, and the plaintiff appeals.

The track of the road as it passes appellant's house runs north and south. The house was situated on the east side of the track, and something over fifty yards from it. As shown by the plaintiff's evidence, there had been no fire in the front of the house for several months, and no fire in it at all on that day, except the kitchen fire to get breakfast, between 5 and 6 in the morning. The house was discovered afire in the roof over one of the front rooms facing the railroad about 10 o'clock. The kitchen fire had then been out several hours. The kitchen was at the back of the house. A strong wind was blowing from the west or from the railroad towards the house. The evidence for the plaintiff also showed that about twenty minutes before the fire was discovered a freight train passed going south, and that at this part of the road, being up grade going south, the engines puffed a good deal. There was also testimony to the effect that along this part of the track, and as far from it as the house was situated, a great many cinders were found on the ground varying in size from a pea to the size of a man's thumb nail. At the time that the house was set on fire the fence, which ran along the railroad, took fire north of the house, and about one-eighth of a mile from it, the fence being on the same side of the railroad as the house. The plaintiff offered to prove that a few days before the fire a fence in the field as far from the track as the house took fire from sparks from an engine that was passing. He also offered to prove that a few days before another fence was set on fire near the plaintiff's house by sparks emitted from a locomotive that was passing on the road. This evidence was excluded by the court, to which the plaintiff excepted.

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The court allowed the evidence to be given of fires occurring on the day that the house burned, but rejected the evidence as to other fires on other days, though about the same time. The propriety of this rule is the first question to be determined on the appeal.

In 2 Shearman & Redfield on Negligence, section 675, after stating that the plaintiff must show by reasonable affirmative evidence that the fire originated from the defendant's locomotive, the learned authors say: "Evidence showing that the engine emitted sparks in size and number sufficient to account for the fire, and flying near the shed or building which actually caught fire, and that the fire was discovered very soon afterwards, no other cause being known, is sufficient to go to the jury on this point. And, when the particular engine which caused the fire can not be fully identified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road upon other occasions, at or about the time of the fire, before or after, is relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same cause." So, in 13 Am. & Eng. Ency. of Law (2d Ed.), 515, the rule is thus stated: "It has been held generally that, in an action for damages from fires alleged to have been caused by sparks from a locomotive, the plaintiff may introduce evidence to show that about the time the fire in question happened the engines of the defendant running past the location of the fire were in such a condition or were so managed as to be likely to set fire to objects in the position of the property burned, or that sparks emitted by engines of the company about that time had set fire to other property similarly situated, and this without showing that these engines were run by the same engineer or were of the same construction as the one that

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occasioned the particular damage." The same rule is laid down in 2 Thompson, Negligence, sections 2373, 2374, and was recognized and approved by this court in Kentucky Central R. R. Co. v. Barrow, 89 Ky., 643, 6 R., 240, 20 S. W., 166, where the court said: "The evidence introduced on the trial of which appellant complains was substantially that trains frequently set fire to the fences and grass at other places in the vicinity of appellee along the line of that road and at different times during the fall of 1881." The court, then, after quoting with approval from Sheldon v. Hudson River R. R., 14 N. Y., 218, a leading case announcing the rule above stated, said: "In our opinion the reasons given in the case referred to in favor of the competency of the evidence there considered apply to this case, and the evidence objected to was properly admitted by the court." This case was followed and approved in L. & N. R. R. v. Samuel's Ex'rs, 22 R., 303, 57 S. W., 235, and I. C. R. R. v. Scheible, 24 R., 1708, 72 S. W., 325.

The locomotives of the defendant are under a unity of management. The screens used in all are the same. The proof for the defendant tended to show that they were all in substantially the same condition as to safety from sparks. The engine that passed just before the house was discovered afire could not be identified by the plaintiff. The fact that other fires occurred on property similarly situated set by these locomotives was a circumstance tending to show that the house, although so far from the track, might have been set afire in the same way. And the fact that other fires occurred tended to show either that there was some defect in the screens used by the defendant or in the management of the engines. We therefore conclude that the evidence rejected by the court should have been admitted.

Appellant also complains that the court erred in its in-

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structions to the jury. The court gave three instructions. The first is not objected to. The second and third are as follows:

"(2) If plaintiff's dwelling house was set on fire otherwise than by sparks or coals of fire from defendant's engines, then the jury should find for the defendant. And if all defendant's engines passing plaintiff's premises at the time of the fire were equipped with safe and approved fire operated without negligence on the part of defendant's servants, then the jury should find for the defendant.

"(3) The court instructs the jury that if they shall believe from the evidence that defendant's locomotive engines which passed by plaintiff's premises on the morning of June 20, 1899, between the hour of 8 o'clock and the time his house caught fire, were equipped with suitable and approved fire arresters, in reasonably good condition, which prevented sparks from escaping from said engines as far as the same was practicable, they must find for the defendant, even if they shall believe from the evidence that said arresters, in good condition, and the trains were run and fire was caused by sparks escaping from the engines, unless they shall further believe that the defendant's employes in charge of said engines operated them so negligently as to cause fire, and the burden is on the plaintiff to prove said engines were operated negligently and carelessly at said time and place.

"Negligence is the absence of ordinary care, and ordinary care is such care as an ordinarily prudent man would use under similar circumstances, involving his own interests."

The first clause of instruction 2 is not objected to. But it is hard to understand why the second clause of this instruction and instruction 3 were both given, as the same idea is expressed in both. So much of the third instruction

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as told the jury that the burden was on the plaintiff to prove that the engines were operated negligently should not have been given, as the court should not instruct the jury upon burden of proof, but simply so frame the instructions as to indicate on whom the burden of proof lies. And while this alone would not be sufficient grounds for reversal, it is better that such instructions should not be given.

It is insisted, also, for appellant, that the instructions do not follow the rule heretofore laid down, in so far as they exempted the defendant from liability if the engines were equipped "with safe and approved fire arresters, in good condition," as expressed in instruction 2, or "with suitable and approved fire arresters in reasonably good condition, which prevented sparks from escaping from said engines as far as the same was practicable," as expressed in instruction 3.

Section 782, Kentucky Statutes, 1899, is as follows: "All companies shall place in, on or around the tops of the chimneys of engines a screen fender damper or other appliances that will prevent as far as possible sparks of fire from escaping from such chimneys." In Ky. Central R. R. Co. v. Barrow, 89 Ky., 638, 6 R., 240, 20 S. W., 165, this court, after quoting the statute, said: "In some of the States railroad companies are by statute made absolutely liable for injuries caused by fire proceeding from their engines, irrespective of any question of negligence; but as such companies are in this State authorized by law to operate their railroads by steam, which necessitates the use of fire, they should not, on principle, in the absence of a statute requiring it, be held liable for injuries unavoidably produced by fire kept and used to generate steam; and that view is in harmony with the act just quoted, for persons and companies operating railroads are not required by that act to

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provide appliances that will effectually and certainly, under every condition, prevent the escape of sparks of fire from the chimneys of their locomotives and cars, but only to provide and use the best and most effectual preventive known to science, so as to prevent as far as possible injury being done in the mode described in the statute to property near railroads."

This case was approved in L. & N. R. R. v. Taylor, 92 Ky., 55, 13 R., 373, 17 S. W., 198, where it was said that the company is "only required to use the best and most effectual preventive known to science and of practical use that will prevent as far as possible sparks escaping from the chimneys of their locomotives." It was again followed in L. & N. R. R. v. Dalton, 102 Ky., 290, 19 R., 1318, 43 S. W., 431, where it was held that the company was liable, though the spark arrester was in good condition, if the engine was handled negligently, and thereby sparks escaped from it and ignited the house. These cases were recently approved in L. & N. R. R. v. Samuel's Ex'r, 22 R., 303, 57 S. W., 235, and I. C. R. R. v. Scheible, 24 R., 1708, 72 S. W., 325. The construction of the statute thus so often announced should not now be departed from, and, in lieu of the last clause of instruction 2 and the whole of instruction 3, the court should have told the jury that if they believed from the evidence that the plaintiff's dwelling house was set on fire by sparks escaping from one of the defendant's engines, yet if they further believed from the evidence that said engine was at the time provided with the best and most effectual spark arrester known to science, and of practical use, properly adjusted, that would prevent, as far as possible, sparks escaping from the chimney of the engine, they should find for the defendant, unless they further believed from the evidence that said engine was operated negligently,

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and by reason thereof sparks escaped from it and set fire to the house. The definition of negligence should also be given as in instruction 3. While the evidence was conflicting on the whole case, we conclude that a new trial should be granted.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

CASE 26—ACTION BY THOMAS J. LANGAN AGAINST ILLINOIS CENTRAL RY. CO. FOR PERSONAL INJURIES.—SEPT. 29.

Illinois Central R. R. Co. v. Langan.

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APPEAL FROM JEFFERSON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

MASTER AND SERVANT—INADEQUATE ASSISTANCE—NEGLIGENCE—ASSUMPTION OF RISK.

Held. 1. A master is liable for the injury sustained by a servant while unloading steel shafts from a car by reason of the foreman's failure to exercise ordinary care in providing a sufficient number of men to assist in doing the work.

2. A servant employed to unload steel shafts from a car did not assume the risk incident to the master employing an inadequate force to assist where the probability of injury was such that the judgment of prudent men might differ on the certainty of its happening, or with reference to whether the force was reasonably adequate to perform the work, and where the master insisted, after objection, that the servant proceed with the work.

PIRTLE & TRABUE AND J. M. DICKINSON, FOR APPELLANT.

MATT O'DOHERTY, FOR APPELLEE.

(No briefs.)

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OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

Appellee was a freight handler at appellant's depot in Louisville. Freight was handled by gangs of four men. When more were needed, additional ones were detached from one gang and added to the other. Appellee and three others were called upon to move steel shafts, weighing from 200 to 460 pounds, from the cars to the freight platform. They were under the direction of a freight clerk. The gang, including appellee, had moved several shafts, weighing about 200 pounds, and requested the freight clerk to obtain assistance for the removal of the larger shafts, which weighed 460 pounds each. They stated to him that they could not in safety or that it would be dangerous for them to attempt to move these larger shafts, which were about twenty feet long, and from four to six inches in diameter, were round, and had been oiled or greased, making it difficult for them to be handled. The freight clerk, having failed to get the additional men after an apparent effort, exclaimed to appellee and the others of his gang, "O, go on!" or something to that effect. In attempting the handling of one of these larger shafts it slipped or was dropped from the hands of the carriers, and fell on appellee's foot, severely injuring it.

This suit for resulting damages was based upon the neglect of appellant in failing to provide a sufficient number of workmen to assist appellee in this work. The instruction of the court upon this point was that it was the duty of the defendant, the railroad company, to furnish a sufficient number of hands to handle in a reasonably safe manner the shafting which injured appellee, and that if it failed to do so, and knew, or by the exercise of ordinary care could have known, that the force furnished for the handling of the shafting in a reasonably safe manner was insufficient,

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and the same was not known by appellee, and could not have been known by him in the exercise of ordinary care, and that appellee did not have equal means of knowing the same with appellant, or its agents superior in authority to him, and that appellee was injured by such failure of appellant, then the law was for the appellee. For the appellant it is objected that this instruction was erroneous, in that it failed to tell the jury that they could find for the injured servant only in the event that his superior, through gross negligence, failed to provide a sufficient number of men to assist in doing the work. I. C. R. Co. v. Coleman, 22 R., 878; 59 S. W., 13.

There are certain risks which a laborer assumes as an incident of his employment. Among these is that of the ordinary negligence of his fellow servants. Although each servant in the common employment is a representative of the master to the extent that he is acting within the scope of his duties, yet for many kinds of ordinary neglect towards his fellow servants the master may not be liable for resulting injuries. However, there are certain duties which the master owes to his servants that are primary and personal in their nature, and which he may not delegate to another so as to escape liability for their non-performance. Among these he owes to his servants to furnish them a reasonably safe place in which to do their work, and must furnish them reasonably safe tools and appliances with which to do it. Alongside of these he must furnish them adequate assistance, or a sufficient number of workmen. So where the master assigns or imposes upon one of his servants the duty of representing him in providing these means, the servant's acts are deemed to be those of the master, and for a simple neglect by such servant the master is responsible as though he acted in person. As said

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in N. P. R. R. Co. v. Herbert, 116 U. S., 642, 6 Sup. Ct., 590; 29 L. Ed., 755: "The servant does not undertake the risks arising from the want of sufficient and skillful colaborers, or from defective machinery His contract implies that in regard to these matters his employer shall make adequate provision that no danger shall ensue to him." Lasch v. Stratton 101 Ky., 672; 19 R., 889; 42 S. W., 756; Thorpe v. Missouri Pac. Ry. Co., 2 S. W., 3.

Appellant's next point is that appellee was aware of the danger in his employment resulting in his injury at the time he undertook it, and that his continuing in this employment, with knowledge of the inadequate force, was equivalent to his own assumption of the danger incident to the task. This would be true if the danger was such an obvious one as that the injury was reasonably certain to result, so that none but a reckless man would have undertaken it under the circumstances. We understand the rule on this subject to be that if the danger or risk is such that a prudent man would have refused to do the work under the circumstances because of the danger, then the servant will act at his peril in undertaking it. But where the probability of injury is such that the minds and judgments of prudent men might well differ upon the certainty of its happening or with regard to whether the force or appliances are reasonably safe or adequate to the performance of the task, and where the master insists, after objection, that the servant proceed with the work, or assures him that the force is adequate or the machinery safe, then the servant has a right to rely upon the master's presumed superior knowledge. The risk is thereby assumed entirely by the master, and he impliedly assures the servant, who relies upon his statement, or who

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obeys his positive direction, that if he, the master, is in error as to the safety, he would indemnify the obedient servant against the consequences. Shearman & Red. Neg., 126; Clark v. Holmes, 7 Hurl. & N., 937; Snow v. Housatonic R. R., 8 Allen, 450; 85 Am. Dec., 720; Conroy v. Vulcan Iron Works, 62 Mo., 39.

Concerning appellant's criticism of the instruction governing contributory negligence, we deem it sufficient to say that there was no evidence of contributory negligence in this case apart from such as may have been included in the act of appellee in handling the shafting with an inadequate force with such knowledge as he may have had of the dangers of the situation, and that feature was submitted to the jury in other instructions.

Perceiving no error in the record prejudicial to appellant, the judgment is affirmed, with damages.

CASE 27—ACTION BY MELTON WHEELER AGAINST HENDERSON TOBACCO EXTRACTS WORKS FOR PERSONAL INJURIES.—SEPT. 29.

Henderson Tobacco Extracts Works v. Wheeler.

APPEAL FROM HENDERSON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

MASTER AND SERVANT—INJURY TO SERVANT—DANGEROUS SERVICE—NEGLIGENCE OF MASTER—DUTY TO PROVIDE SAFE PREMISES—PRIMARY LIABILITY OF MASTER—CONTRIBUTORY NEGLIGENCE OF SERVANT—RELATIVE DUTIES—QUESTION FOR JURY.

Held: 1. An employe at a factory was injured while carrying a bucket of heavy fluid up some movable steps to pour into a revolving cylinder, when, by something giving way, he was thrown into the cylinder and three ribs broken and his arm so injured

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that it had to be amputated. He knew the work was dangerous, and had worked there before, but not within the past year. HELD, that whilst it is the duty of the servant to exercise that degree of care which is commensurate with the character of his employment in order to protect himself from injury, and if he fails to exercise this care he can not recover for an injury to which his own negligence has contributed, it is the primary duty of the master both to provide and keep in a reasonably safe condition the place of work, and this duty is more important than the duty of the servant to use reasonable care to protect himself.

2. Where the servant was directed by his master's foreman to work in a dangerous place, where neither the step nor the foundation afforded a safe place in which to perform such dangerous service, the servant was not required to make a minute examination of the approaches thereto, but had a right to believe that they were safe; and the master can not escape his primary liability to keep the place safe by charging that it was the duty of the servant to have carefully examined the approaches and the steps before obeying the command of the foreman.

3. The care which parties are required to use in the discharge of their respective duties varies so much with the situation of the parties and the circumstances of each particular case that it is the policy of the law to leave questions of this kind to the jury.

R. H. CUNNINGHAM, COUNSEL FOR APPELLANT.

QUESTIONS AND AUTHORITIES.

1. The master is not an insurer of the servant against accidents. Shearman & Redfield, Neg., 203; 24 Ky. Law Rep., 1318.

2. The master's duty is to provide reasonably safe machinery with reasonably safe approach to reasonably safe place to work. Shearman & Redfield, Neg., 194; 24 Ky. Law Rep., 1318.

3. The servant's duty is to use reasonable care in going to and doing his work; to use his eyes and ears, and his judgment. Wood's Master and Servant, 326; 24 Ky. Law Rep., 776.

4. The duty of inspection is cast upon the servant by his knowledge of any fact that would put one of ordinary prudence, and of his circumstances and capacity upon inquiry. Shearman & Redfield, Neg., 217; 84 Ky., 330.

5. It is the duty of the servant to give notice of defects and to complain; and his failure to do so is contributory neglect. Shear. & Red., Neg., 221; 84 Ky., 330.

6. The master is not liable for any defects of which he had no notice and could not discover by ordinary care. Shear. & Red., Neg., 195; 24 Ky. Law Rep., 1318; 84 Ky., 330.

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7. The master is not liable for consequences of a condition which were unexpected and could not be contemplated. Watson's Pers. Inj., pp. 28, 180, 189; 94 U. S., 469; 105 U. S., 249; 56 S. W. Rep., 21.

8. Past experience and condition may be shown by which to judge of what might be expected. Watson's Pers. Inj., pp. 199 *et seq.*, 208; 168 U. S., 135.

9. Negligence is a question of proximate cause and contemplation of consequences. Watson's Pers. Inj., p. 204; 56 S. W., 21.

10. Non-suit is proper when the evidence gives only ground for conjecture. Watson's Pers. Inj., 219, 367; 47 S. W., 440; 48 S. W., 434; Shear. & Red., Neg., 223.

11. The servant assumes the ordinary risk of his employment. Wood's Master and Servant, 326, 385; 23 Ky. Law Rep., 2154; 50 Am. St. Rep., 202; 53 Am. St. Rep., 129; 84 Ky., 330; 69 Am. St. Rep., 538.

12. It is contributory neglect for the servant to disregard the risk of his employment, and it may be pleaded generally. 101 Ky., 106.

13. The servant's failure to give notice of defects is contributory neglect. Shear. & Red., Neg., 221.

14. No negligence is inferred from accident, and to show liability of the master, there must be affirmative proof of his fault. Shear. & Red., Neg., 223; Wood's Master and Servant, 382; 84 Ky., 330; 24 Ky. Law Rep., 1318.

15. Evidence that machinery worked properly before and after an accident is competent to disprove neglect of the master. Shear. & Red., Neg., 223.

16. A peremptory instruction for the defendant should have been given. 54 L. R. A., 258; 23 Ky. Law Rep., 2154; 24 Ky. Law Rep., 253; 24 Ky. Law Rep., 796; 24 Ky. Law Rep., 1318.

17. Evidence of changes made after an accident was improper. Watson's Pers. Inj., 778, 762, 764; 13 Ky. Law Rep., 626; Shear. & Red., Neg., 60c.

A. O. STANLEY AND MONTGOMERY MERRITT, ATTORNEYS FOR APPELLEE.

1. It is admitted that the law requires the employer to furnish employe a reasonably safe place in which to work and reasonably safe tools and appliances to work with. By the expenditure of five dollars the place where appellee was at work could have been made entirely safe.

2. But it is contended that appellee knew of this danger and assumed the risk. He had been at work only a day when the accident occurred and had not been about it for a year before.

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He was no carpenter. He was not required to inspect the steps or the approach to the machine or to repair them. The superintendent was superior in knowledge and authority to appellee, and it was his duty to see that the steps were secure and a guard rail put up and not leave the matter for a poor negro to determine the existence of the danger or assumption of the risk.

AUTHORITIES CITED.

Wake v. Price, 58 S. W., 519; C. N. O. & T. P. R. Co. v. Simpson's Admr., 30 S. W., 13; Brooks v. L. & N. R. Co., 71 S. W., 507; Crabtree Coal & Mining Co. v. Sample's Admr., 24 R., 1703; 20 Am. & Eng. Ency. of Law, 71; L. & N. R. Co. v. Howard's Admr., 82 Ky., 212; Shelby v. C. N. O. & T. P. R. Co., 85 Ky., 224; 98 Ky., 367 and 587.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—AFFIRMING.

The appellee, Melton Wheeler, instituted this action against the appellant, the Henderson Tobacco Extracts Works, to recover damages for a personal injury sustained by him whilst in their employ, which he alleges was due to negligence on their part. The record discloses that appellant is a corporation which has been engaged in the manufacture of an extract from tobacco, which is principally used as a sheep wash. The machine used for this purpose consisted of a stationary iron cylinder, which was set upon a solid brick foundation two feet six inches in height. Within this cylinder, which extended about three feet above the foundation, there was a brass cylinder, which was revolved within the heavy stationary iron cylinder by steam power, by means of a belt connecting it with an engine. Inside of the brass cylinder, which was about two feet in diameter and fourteen inches deep, a bag was sewed at the top to a wire hoop, into which the liquid extract was poured from a water bucket, and the motion of the cylinder, revolving twelve hundred times a minute, threw the extract against the sides of the bag, through which it strained and ran off from the bottom through an iron pipe. The foundation

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under the iron cylinder projected six and one-half inches. The liquid extract was carried to the cylinder in buckets by a man who went up a stepladder of three steps eight inches wide, which rested on a brick floor at the bottom, and the top step of which was even with the foundation of the iron cylinder. These steps were entirely unsecured at the bottom. There is some testimony conducing to show that a plank was nailed to the top step, which projected slightly over the top of the foundation. The steps were movable, and were frequently carried from one place to another around the foundation. The man who poured the extract into the revolving cylinder stood with one foot on the top step and the other on the narrow projecting foundation, and leaned over so as to pour the fluid into the center opening slowly. The liquid was about twice as heavy as water, and quite slimy, and the testimony shows was frequently spilled on the steps and the projecting foundation. The appellee, a negro man, had been employed in the factory for eight or nine years as a laborer under the supervision of a foreman, and on the 23d of February, 1902, was instructed by the foreman to pour the extract into the cylinder, which was called a "centrifugal," and operate the machine. He testified that after he had poured in four or five buckets of the extract, and while he was standing looking into the cylinder, with one foot on the projecting foundation and the other on the movable steps, something gave way beneath him, and he was thrown against the cylinder, and his arm caught, and he was instantly jerked into the revolving cylinder, and after being carried around several times was thrown out upon the floor with a broken arm, which was afterwards amputated, two broken ribs, and severe injuries about the head, face, and body, entirely unconscious, and from which injuries he was for a long

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time confined under the care of a physician. The trial resulted in a verdict for appellee for $1,000, under instructions which are not seriously complained of, and which were in fact as favorable to the defendant as the law authorized. Substantially the only ground upon which a reversal is asked is the failure of the trial court to direct a verdict in favor of the defendant. This contention is based upon the claim that the appellee knew the danger of the service which he was directed to perform and assumed the risk incident thereto.

Whilst it is the duty of a servant to exercise that degree of care which is commensurate with the character of his occupation, in order to protect himself from injury, and if he fails to exercise this care can not recover of the master for an injury to which his own negligence has contributed, it is the primary duty of the master both to provide and keep in a reasonably safe condition the place of work, and this duty is more important than the duty of the servant to use reasonable care to protect himself. See Ashland Coal & Iron Co. v. Wallace, 101 Ky., 626, 19 R., 849, 42 S. W., 744; 43 S. W., 207; Crabtree Coal & Mining Co. v. Sample's Admr., 24 R., 1703, 72 S. W., 24. We think it is conclusively shown by the testimony in this case that this primary duty has not been complied with by the defendant. Mr. Routsch, the assistant manager of the company, was introduced as a witness, and upon cross-examination testified as follows on this point: "Q. Do you know whether anything was fastened to the top of those steps? A. I do not. Q. That sheep wash, when dropped out of the bucket, is slippery, is it not? A. Yes, sir. Q. Was there any place to set the bucket on except the projecting foundation, and don't that leave a slippery place? A. Yes, sir. Q. Ought there not to be some place to set the bucket besides where the foot would get in it?

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A. He might have gone down the steps with it and set it down. Q. They usually set the bucket here, did they not? A. Yes, sir. Q. Would it not have been safer to have a shelf to set the bucket on? A. Yes; I think it would. Q. Would it have taken much time or expense to put a guardrail there? A. No. Q. Would it not have been much safer for the man leaning over the centrifugal? A. Yes, sir. Q. Are you not much less liable to slip with a guardrail there? A. Yes. Q. Do you consider these steps safe? A. They might be better. Q. You say they might be better? A. I think so. Q. You say you have known Melton Wheeler for nine years. What character of workman is he? A. He is careful, trusty and faithful. Q. He had no authority in the premises? A. No, he did what he was told; he had no discretion."

The testimony shows that whilst appellee had on several occasions performed the services in which he was engaged, during the course of his employment, that it was not his regular service, and that he had not been so engaged, prior to the day on which the accident occurred, for more than a year. It is not claimed that appellee was directed to make any change in the steps or the approaches to the centrifugal in any way, and that he had no authority to do so without direction is testified to by appellant's manager. When appellee was directed by appellant's foreman to carry the sheep wash to the centrifugal and operate it, he was not called upon to make any minute examination of the approaches thereto, but had the right to believe that they were in a solid and substantial condition. The service was dangerous. The slightest loss of balance on his part was liable to occasion the accident for which he sues. Neither the steps nor the foundation afforded a safe place on which to perform such dangerous service. A small ex-

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penditure of time and money would have rendered the place comparatively safe. Appellant can not be permitted to escape liability for such primary negligence by the charge that it was appellee's duty, before he obeyed the commands given him, to have carefully examined the approaches and the steps. It was appellee's duty to obey the directions of the foreman, and he had a right to believe that the steps were safe. The care which parties are required to use in the discharge of their respective duties varies so much with the situation of the parties and the circumstances of each particular case that it is the policy of the law to leave questions of this kind to the jury, and we are unable to discover any reason why this rule of law should not be applied in this case.

Judgment affirmed.

Judge Barker dissents.

Petition for re-hearing by appellant overruled.

CASE 28—PROCEEDING BY THE COMMONWEALTH AGAINST ZACHARIAH PHILLIPS AND HIS SURETY ON A FORFEITED BAIL BOND.—OCT.

Commonwealth v. Philllips.

116 329
e137 75

APPEAL FROM BOYD CIRCUIT COURT.

PROCEEDING DISMISSED AND COMMONWEALTH APPEALS. AFFIRMED.

BAIL BOND—FELONY—TAKEN BY SHERIFF—DEFENDANT NOT HAVING BEEN BEFORE MAGISTRATE—VALIDITY.

Held: 1. Under Criminal Code, section 27, providing that a magistrate in issuing a warrant of arrest shall describe the offense, and direct the officer to bring the person before a magistrate, to be dealt with according to the law; and section 28, declaring that if the offense be a misdemeanor, the magistrate issuing the warrant shall indorse thereon the amount of bail; and section 29, providing that if defendant give bail "as provided in the last section," the officer taking it shall fix the day of defendant's ap-

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pearance; and section 33, providing that the officer who has executed the warrant of arrest shall make return on it, and deliver it to the magistrate before whom defendant is brought, or, if bail be given as provided by section 28, shall deliver the warrant and bail bond to the officer before whom defendant is bound by the bond to appear for an examination; and section 74, providing that before conviction defendant may be admitted to bail for his appearance before a magistrate for an examination if the offense be a misdemeanor, or for his appearance in court to which he is sent for trial—a person charged with a felony may not be admitted to bail before being brought before a magistrate, and, though the magistrate issuing the warrant charging a felony indorse bail on it, a bond accepted by the sheriff is void.

C. J. PRATT, ATTORNEY GENERAL, AND M. R. TODD, FOR APPELLANT.

The material question in the case is as to the sufficiency of the bail bond. It has been held by this court that "it is essential to the validity of a recognizance or bail bond that it appear that the defendant was, when recognized or bailed, legally in custody, charged with a public offense, and was discharged therefrom by reason of giving the bond or recognizance and that it can be ascertained from the bond or recognizance that the bail undertook that the defendant should appear before a magistrate for an examination of the charge or before a court for the trial thereof." Henry v. Com., 4 Bush, 427; Com. v. Cummins, 18 B. Mon., 26.

It is also provided in section 85, Criminal Code that: "No bail bond or bail or recognizances shall be deemed to be invalid by reason of any variance between its stipulations and the provisions of this Code, nor by failure of the magistrate or officer to transmit or deliver the same at the times herein provided, nor by any other irregularity, provided it be made to appear that the defendant was legally in custody, charged with a public offense, and that he was discharged by reason of the giving of the bond or recognizance, and provided that it can be ascertained from the bond or recognizance, that the bail undertook that the defendant should appear before a magistrate for the examination of the charge, or before a court for the trial thereof."

The bond refers to the warrant of arrest, and says "to answer the charge in the within warrant." The warrant and the return thereon should therefore be read in connection with this warrant; and in that way the bond shows that Phillips was legally in custody; it shows that he was charged with a public offense, namely, the offense named in the warrant; that the bail undertook that the defendant should appear before the police judge at Catlettsburg on the 1st of September, 1902, to answer said

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charge named in the warrant. Hence, we conclude that the lower court was in error in sustaining a demurrer to the warrant, in quashing the same and in discharging said James Hatcher from his liability thereon. We therefore respectfully ask that the judgment below be reversed, with directions to render a judgment on said bond in favor of the Commonwealth against the said surety.

AUTHORITIES CITED.

98 Ky., 593; 75 Ky., 84; 11 R., 401; 8 Bush, 463; Code, secs. 27, 28, 29-33, 71, 46, 47, 48-85; 4 Bush, 427; 18 B. Mon., 26.

L. T. EVERETT, ATTORNEY FOR APPELLEES.

On the 28th day of July, 1902, J. H. McConnell, judge of the Catlettsburg police court, issued a warrant charging Zachariah Phillips with obtaining money under false pretense. Said warrant was directed and sent to the sheriff of Pike county for execution. At the time of issuing the warrant the said police judge made the following endorsement thereon: "Defendants may give bond for their appearance to answer the above charge in the sum of $300." The sheriff of Pike county arrested said Phillips under said warrant and took bond for his appearance before said McConnell, police judge of the city of Catlettsburg with James Hatcher as surety and returned the warrant and bond to said police judge. Phillips did not appear before said police judge and he thereupon made the following endorsement on one corner of the warrant, viz.: "Forfeited. J. H. McConnell, P. J., C. C.," and in this condition the warrant was transmitted to the circuit court and there the said forfeiture is attempted to be enforced. I respectfully submit that such proceeding is not only unauthorized by law, but is absolutely void and should not be tolerated.

In the first place the police judge had absolutely no authority to fix bail at the time of issuing the warrant, the charge being a felony. By reference to section 28, Criminal Code, it will be seen that only in misdemeanor cases can bail be endorsed by the police judge when issuing the warrant. The warrant in this case as well as all other warrants in felony cases requires the arresting officer to bring the defendant before the police judge, and until that is done no bail can be allowed and no one save the court is allowed to take bond. In this case it is not and can not be claimed that the police judge ever had the defendant before him, or held an examining trial, or that he ever made the slightest record of any proceedings relative thereto, and hence had no power or authority to fix bail.

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The case of Morgan, &c., v. The Commonwealth, 12 Bush, 84, seems conclusive of this matter. Quoting therefrom: "It is indispensable to the validity of the bail bond taken by, or in pursuance of an examining court that some judgment be entered or memorandum made in writing, signed by the magistrate or justice, showing that an examining court was held and that the accused was admitted to bail." Quoting further: "It is indispensable that the decision of the examining court, requiring the accused to give bail, shall be filed in the trial court at least before there is a forfeiture of the bail bond."

In the case at bar no examining trial was ever had, no bail ever fixed, and no record ever transmitted to the circuit court, except the warrant, and this we contend is not sufficient. Then, too, the forfeiture should have been taken in the circuit court and not in the police court; the latter court has no power to take the forfeiture, but must transmit his records to the trial court where all other steps must be taken.

It will also be observed from the record that when the indictment was returned it was not against Zachariah Phillips, but against J. C. and W. P. Phillips. It seems that the style of the prosecution was changed and subsequently the entire prosecution was dismissed. I submit that under the proceedings in this case it would be a great injustice, as well as unlawful, to require Mr. Hatcher to pay $300 as surety herein.

Wherefore an affirmance is respectfully asked.

OPINION OF THE COURT BY JUDGE NUNN—AFFIRMING.

It appears from the record that on the 28th of July, 1902, J. H. McConnell was police judge of the city of Catlettsburg, Boyd county, Ky.; that on that day he issued a warrant of arrest, directed to the sheriff of Pike county Ky., charging Phillips with a felony, to-wit, obtaining money by false pretenses, and representations; that the offense was committed in the city of Catlettsburg, and directing the sheriff to arrest him, and bring him to his office in Catlettsburg to answer the charge. The police judge made this indorsement on the warrant: "Defendant may give bond for his appearance to answer the within charge in the sum of $300. J. H. McConnell, P. J. C. C." The sheriff of Pike county arrested Phillips, and took his bond, with James

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Hatcher as surety. The bond is as follows: "We acknowledge ourselves bound to the Commonwealth of Kentucky in the sum of $300 that Zachariah Phillips will appear in the Catlettsburg police court on the 1st day of September, 1902, to answer the charge in the within warrant. This the 8th day of August, 1902. Z. W. Phillips. James Hatcher." Phillips failed to appear at the time stated in the bond, and the police judge indorsed the word "Forfeited" thereon, and returned the bond to the circuit court clerk's office. The circuit court directed a summons to be issued thereon against James Hatcher, who appeared and demurred to the proceeding against him. The court sustained his demurrer and dismissed the proceeding against him, and the Commonwealth has appealed.

The only question to determine is whether or not the police judge had the legal right to indorse bail on this warrant, and whether or not the sheriff had the right to accept bail by virtue of such an indorsement. Under section 27 of the Criminal Code a magistrate in issuing a warrant of arrest shall, in brief, describe the offense, state the county in which it was committed, and command the officer to whom it was directed to arrest the person named therein, and bring him before some magistrate of the county in which the offense was committed, to be dealt with according to the law. This section requires that the person arrested be brought before the court, but, as modified by the next section, it is left applicable alone to felonies. The next section (No. 28) declares that, if the offense charged be a misdemeanor, the magistrate issuing the warrant shall indorse thereon the amount of bail to be given by the person charged, and that the bail may be taken by the sheriff of the county where the arrest is made or where the offense was committed. This bond may also be taken by a deputy sheriff, or by any constable making the arrest. By the next

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succeeding section it is stated if the defendant give bail for his appearance before the magistrate for an examination of the charge as provided in the last section, the officer taking the bail shall fix the day of the defendant's appearance, etc. This section confines bail given for the appearance before the magistrate for an examination to one charged with a misdemeanor, and excludes the idea that one charged with a felony can give bail for his appearance before a magistrate. By section 33 it is provided that the officer who has executed the warrant of arrest shall make return on the warrant of the time and manner of executing it, and deliver the warrant to the magistrate before whom the defendant is brought, or, if bail be given as provided by section 28, shall deliver the warrant and bail bond to the officer before whom the defendant is bound by the bail bond to appear for an examination of the charge. By the foregoing sections it is made clear that a person charged with a felony can not be admitted to bail before being brought before a magistrate. In further support of this conclusion reference is made to section 74 of the Criminal Code, which provides: "Before conviction, the defendant may be admitted to bail—1st for his appearance before a magistrate for an examination of the charge, if the offence charged be a misdemeanor; or, 2d, for his appearance in the court to which he is sent for trial (meaning after the magistrate has held the examining trial, etc.)" From these provisions of the Code we are of the opinion that the police judge had no legal authority to indorse bail on the warrant of arrest, and the indorsement of bail did not authorize the sheriff to accept the bond. Their acts in this matter being unauthorized and illegal, therefore the bond was void, and the surety, Hatcher, was not bound thereon, and the lower court was right in sustaining the demurrer.

Wherefore the judgment is affirmed.

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CASE 29—INDICTMENT AGAINST EDDIE LOWE FOR RAPE.—OCT. 1.

Commonwealth v. Lowe.

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f125 197

APPEAL FROM GREEN CIRCUIT COURT.

DEMURRER TO INDICTMENT SUSTAINED AND COMMONWEALTH APPEALS. REVERSED.

RAPE—INDICTMENT—SCIENTER—DISJUNCTIVES.

Held: 1. An indictment charging that defendant wilfully and feloniously had intercourse with a female against her will or consent, or while she was insensible, or incapable of exercising her will, a drug having been administered to her, need not allege that he knew she was incapable of giving consent by reason of the administration of a drug.

2. An indictment charging that defendant feloniously had intercourse with a female against her will or consent, or while she was insensible or incapable of exercising her will, a drug having been administered to her, is not duplicitous, but is proper, under Criminal Code, section 126, providing that an indictment must charge but one offense; but if it may have been committed in different modes, or by different means, the indictment may allege the modes and means in the alternative.

C. J. PRATT, ATTORNEY GENERAL, AND M. R. TODD, FOR APPELLANT.

This indictment was returned under section 1154, Kentucky Statutes, which reads as follows:

"Whoever shall unlawfully carnally know a female, of and above twelve years of age, against her will or consent, or by force, or whilst she is *insensible*, shall be guilty of rape, and punished by confinement in the penitentiary not less than ten nor more than twenty years, or by death, in the discretion of the jury."

We are not advised upon what ground or for what reason the court below sustained the demurrer to the indictment. This is an offense created by statute, and the words of the statute are descriptive of the offense. It has been held in several cases that where the words of the statute are descriptive of the offense the indictment should follow the language of the statute, and in that way describe the offense. (Com. v. Tanner, 6 Bush, 315; Com. v. Turner, 8 Bush, 1; Davis v. Com., 13 Bush, 318; Sellers v. Com., 13 Bush, 331.)

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It is stated in the indictment that Ethel Paxton was *insensible* at the time appellee had carnal knowledge of her; that she was rendered incapable of exercising her will power and had no self-control because a drug unknown to the grand jury had been administered to her by the appellee. This was certainly a sufficient charge or statement of facts to show that she was "insensible" at the time the offense was committed. It seems to us that all the necessary averments are made to constitute a good indictment under section 1154, Kentucky Statutes. Hence, we respectfully ask that the judgment below be reversed. Wharton's Criminal Pleading, 161; Am. & Eng. Pl., vol. 10, p. 490-538; Com. v. Stout, 7 B. M., 247.

W. T. CANTRELL, FOR APPELLEE.

AUTHORITIES CITED.

1. The indictment is fatally defective in that it fails to allege that the defendant knew of the alleged condition of the prosecuting witness, or that he knew some drug had been administered to her, and of her incapacity to assent or dissent to the act. 23 Am. & Eng. Ency. of Law, 856, note 1; Clark's Crim. Law, 186; Com. v. Burke, 105 Mass., 376; Roberson's Ky. Crim. Law, 1, vol. 343.

2. The offense must not be stated in the disjunctive, for if the rule were otherwise, it would always be uncertain which of the two accusations is intended. Clark's Crim. Proc., 169; Com. v. Perrigo, 3 Met., 5; Bishop's Crim. Prac., secs. 333, 334.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

The question for decision by this court upon this appeal is the sufficiency of the indictment wherein the appellee, Eddie Lowe, is charged with a violation of section 1154 of the Kentucky Statutes of 1899, which reads as follows: "Whoever shall unlawfully carnally know a female, of and above twelve years of age, against her will or consent, or by force, or whilst she is insensible, shall be guilty of rape, and punished by confinement in the penitentiary not less than ten nor more than twenty years, or by death in the discretion of the jury." The indictment reads as follows: "The grand jury of the county of Green, in the name and by the authority of the Commonwealth of Kentucky, ac-

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cuse Eddie Lowe of the crime of carnally knowing a female against her will or consent, committed in manner and form as follows, to-wit: The said Eddie Lowe, in the said county of Green, on the 6th day of June, 1902,, and before the finding of the indictment herein, did unlawfully, willfully, and feloniously carnally know a female, to-wit, Miss Ethel Paxton, of and above twelve years of age, against her will or consent, or whilst she was insensible or incapable of exercising her will, some drug to the grand jury unknown having been administered to her, and she being incapable of exercising her will power at the time, and having no self control, contrary to form of the statute in such cases made and provided, and against the peace and dignity of the Commonwealth of Kentucky." The trial court sustained a demurrer to this indictment, and the Commonwealth prosecutes this appeal.

It is insisted for appellee upon this appeal that the indictment is fatally defective for two reasons: First, because it does not charge that the defendant knew that the prosecuting witness was insensible, in consequence of a drug having been administered to her; second, that the offense with which he is charged is not stated with sufficient certainty to apprise him of the specific crime for which he is to be prosecuted, in consequence of the use of the disjunctive "or" instead of the conjunctive "and" in the indictment. The certainty required by section 124 of the Criminal Code must be such as will apprise the defendant of the nature of the accusation, and enable him to plead the indictment and the judgment thereon in bar of any subsequent prosecution for the same offense. See Com. v. White, 18 B. Mon., 493; Com. v. Perrigo, 3 Metc., 5. The complaint that the indictment does not charge that the accused knew that Miss Paxton was incapable of giving con-

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sent by reason of the administration to her of some drug is not well taken. The gist of the charge against the defendant is that he had wilifully and feloniously had intercourse with Miss Paxton against her will or without her consent; in other words, that he was guilty of the common-law crime of rape. This crime belongs to that class of felonies where the statement of the act necessarily implies a knowledge of its illegality, and where no averment of knowledge or bad intent is necessary. In discussing this question, Mr. Wharton in his Criminal Pleading and Praceice (8th Ed.) says: "Where guilty knowledge is not an essential ingredient of the offense, or where a statement of the act itself necessarily includes a knowledge of the illegality of the act, no averment of knowledge is necessary." To the same effect is 1 Hale, P. C., 561; 2 East, P. C., 51; 1 Chitty, Criminal Law, 242; and Commonwealth v. Stout, etc., 46 Ky., 249. It is otherwise, however, in that class of cases where guilty knowledge is not implied, and is a substantive ingredient of the offense. Thus, in an indictment for selling an obscene book, a scienter is necessary; so an indictment for selling unwholesome water. See Wharton's Criminal Pleading & Practice, section 164, and 10 A. & E. En. of P. & P., 491. The enumeration in the indictment disjunctively of several different means which may have been resorted to by the accused in the commission of the offense seems to be expressly authorized by section 126 of the Criminal Code, which reads as follows: "An indictment, except in the cases mentioned in the next section, must charge but one offense; but if it may have been committed in different modes or by different means, the indictment may allege the modes and means in the alternative." This provision of the Code changes the common-law rule as to alternative allegations in an indictment as to the dif-

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ferent modes and means which the accused may have resorted to in the commission of the offense charged. The indictment only charges the defendant with one offense—that of willfully and feloniously carnally knowing a female above the age of twelve years against her will and consent. The alternative statements complained of only refer to the modes or means by which he may have accomplished the crime. It would certainly have been competent to have shown that the woman was incapable of giving consent by reason of the fact that she had been previously drugged, if the indictment had only charged defendant with having carnally known her against her consent. It follows, therefore, that the indictment under this provision of the Code is not objectionable for duplicity, and that the trial court erred in sustaining the demurrer. For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

CASE 30—ACTION BY BROWN ANDERSON AGAINST LOUISA A. KEMPER FOR THE TERMINATION OF A TRUST.—OCT. 1.

Anderson v. Kemper and Others.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

JUDGMENT FOR DEFENDANTS AND PLAINTIFF APPEALS. AFFIRMED.

SPENDTHRIFT——TRUST—CREATION—CONSTRUCTION—PURPOSE—TERMINATION—RIGHTS OF CESTUI QUE TRUST—REMAINDERMAN—CHANGE—TRUSTEE—DISCHARGE—GROUNDS—INCOMPATIBILITY.

Held: 1. Plaintiff, who was a spendthrift, conveyed certain real estate to his father by absolute deed. As part of the same transaction, however, a bond was executed by the father, binding the obligors to pay plaintiff an annuity, and at his death to pay $7,000 to plaintiff's heirs. The intent of the proceedings was to divest plaintiff of the title to the property, but to preserve to

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him the beneficial use thereof during his life, and to secure the value of the remainder to his heirs at his death. HELD, that such deed and bond, when construed together, created an express trust for plaintiff's benefit.

2. Where, by certain conveyances, to which plaintiff was a party as grantor, his property was conveyed to trustees for his benefit for life, and thereafter to be divided among his heirs, the fact that by reason of a change in plaintiff's habits he thereafter became competent to manage his affairs, and desired to do so, was insufficient to authorize a termination of the trust.
3. Where land was conveyed for the benefit of the grantor for life, remainder to his heirs, a subsequent instrument, in so far as it purported to change the beneficiary in remainder, was invalid.
4. Where a trust of certain lands provided that the grantor should receive an annuity of $500 per year, and on his death the property should go to his heirs, it was competent for such grantor during his life to change the annuity to one providing for the whole of the net income of the estate necessary for his support.
5. Where trustees have managed an estate, with strict fidelity and unusual ability, they will not be discharged because of mere strained relations between them and the cestui que trust, which were probably due to the cestui's own misconduct and misjudgment of the trustees.
6. Where trustees, by reason of an advancement of their personal funds, had become creditors of the trust, a judgment appropriating one-half of the net income to the repayment of such advancement, subject to the original trust to pay so much of the income as was necessary for the cestui's support, should be construed as only authorizing an appropriation to the trustees after a sufficient amount had been appropriated for the cestui's support.

JOHN ROBERTS, D. M. RODMAN AND SAMUEL CLEAVER; FOR APPELLANT.

STATEMENT OF QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. The statute of limitation does not bar a subsisting and continuing trust. Sec. 2543, Ky. Stats.

2. A judgment on demurrer does not bar a subsequent suit based upon a cause of action. Birch v. Funk, 2 Met., 544.

3. Advice given by a chancellor to a trustee where the basis of the trust is not before him, is no justification of the acts of the trustee pursuant to such advice, nor will the approval of the acts of a trustee by the chancellor based upon such imperfect information relieve the trustee from liability, when the

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true state of the case is brought before the court of equity in a subsequent proceeding.

4. Lasting and permanent buildings made upon real estate ought not to be charged exclusively upon the income of a life tenant.

5. A trustee without express power has no right to borrow money to make permanent buildings on real estate and charge the income with exclusive expense.

6. The chancellor ought not to appoint trustees who are unfriendly to the beneficiary and whose interest it is to keep up the remainder at the expense of a life estate, especially where the remaindermen derive their title through the benevolence of the life tenant.

POINTS AND AUTHORITIES CITED.

Res adjudicata. Maize v. Bowman, 93 Ky., 205; 17 R., 81; Pepper v. Donnelly, 87 Ky., 259; Birch v. Funk, 2 Met., 544.

Statute of limitations. Beach v. Cummins, 13 Rep., 831; Schwartz v. Castlen, 22 Rep., 1063; Caldwell v. Hampden, 21 Rep., 793; Spalding's Heirs v. I. S. Reform, 21 Rep., 1107; Kerr on Fraud and Mistake, pp. 308-310 and notes; Same, pp. 155-6-7-164; 3 Redfield on Wills, p. 601; 2 Story's Equity, sec. 1520 (a); Angell on Limitations, 183-191; Adams' Equity, pp. 63-4; Mitchell v. Tyler, 20 Rep. (Ky.), 1250.

Dealings between fiduciaries and cestui que trust void. Kerr on Fraud and Mistake, 158 and notes; Pomeroy's Eq. Jur., 956; Perry on Trusts. 2d ed., sec. 104; Willard's Eq. J., pp. 169-176; Schouler's Dom. Relations, sec. 389; Hill on Trustees, 159, 536; Brannin v. Sherley, 91 Ky., 455; Webster v. Bush, 19 Rep.; 2 Story's Eq., sec. 1316; Longest v. Tyler, 1 Duval, 193.

Remaindermen Sutton, &c., can not profit by conduct of trustees. 3 Redfield on Wills, p. 601; Thomas v. Hite, 5 B. Mon., 598.

WILKINS G. ANDERSON, ATTORNEY FOR APPELLEES.

(No brief for appellees in the record.)

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

Appellant had the title to certain unimproved city and rural property in Jefferson county prior to 1872, which had descended from his maternal grandfather. It was supposed to be worth about $9,000. In addition, he had about $5,000 of personal estate similarly derived, which went into the hands of his father, James Anderson, Jr., as his guar-

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dian. The guardian settled with appellant, and paid him in full; indeed, overpaid him, as shown by the settlement made after appellant's manhood. James Anderson, Jr., had six children—five daughters and the appellant. He died July 1, 1882. He had been a successful business man. By reason of certain intemperate habits and disinclination to work or to engage in business, appellant soon squandered the personalty above mentioned, and was taking steps looking to the sale of his realty. According to appellant's own statement, he was not only a wild reckless young fellow then, but had neither the taste nor aptitude for business. He seems to have been almost oblivious of the serious affairs of life. It does not appear that this was because of deficient mind, but was rather a disinclination and a refusal to take interest in them. Probably with these characteristics in mind, as well as a remembrance of his recent experience, and an acknowledgment of his disqualification for managing with safety such an estate, appellant executed a deed conveying the above-named real estate to his father July 9, 1872. Certain it is, whatever may have been the moving consideration, that such conveyance by ordinary deed, conveying apparently the fee-simple title, was then executed by appellant. The recited consideration was $9,000 cash. It is now admitted that in fact the $9,000 recited as the consideration was not paid. Instead, James Anderson, Jr., with his daughter, Edmonia P. Anderson, as his surety, executed to Geo. W. Anderson as trustee for appellant, an annuity bond, binding the obligors to pay to appellant $500 annually, and at his death to pay $7,000 to his heirs. This agreement continued till July, 1877. From July, 1872, to July, 1877, the $500 provided for by the bond had been promptly paid to Brown Anderson. James Anderson, Jr., had in 1877 come to quite

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an advanced age. He then prepared to make a will. As the result of a conference with certain members of the family, including appellant, James Anderson, Jr., conveyed the identical property which had been conveyed to him by appellant to three trustees, to-wit, Geo. W. Anderson, Edmonia P. Anderson, and Wilkins G. Anderson (the latter a son-in-law and nephew to the grantor), to hold and manage in trust for appellant. The terms and conditions of the trust were: (1) That the trustees, or the survivors of them, might sell and convey the property and reinvest the proceeds. (2) That they should pay to Brown Anderson (appellant), during his natural life, so much of the net rents, issues, and profits of the said lands or proceeds as might be necessary for his support; the payment to be yearly, half-yearly, quarterly, or monthly, as his needs might require. (3) If Brown Anderson should die with issue, then such land should go to them in fee simple. (4) If he should die without issue, then the property should go to the lawful heirs of James Anderson, Jr. Appellant, Brown Anderson, was named in this last deed as the party of the third part, and signed and acknowledged it. The trustees named accepted the trust, and have been ever since executing it. At the same time when this deed was made the bond executed July 9, 1872, was canceled in consideration of this settlement. By his will, prepared at or about the same time, James Anderson, Jr., directed his estate divided into six equal parts. After satisfying certain specific bequests, he gave to the same trustees a one-sixth part, the income only of which was to be applied, as far as necessary, to the support of appellant. Touching this the will provided: "In no event or contingency shall said Brown have right in or control over the principal of said one-sixth, or more of the income than is necessary for his support." At

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Brown's death this principal was to be disposed of exactly as was done in the deed of 1877. One of the trustees (Geo. W. Anderson) died some years ago. This suit was brought by appellant, Brown Anderson, against the surviving trustees, who are also the surviving executors of James Anderson, Jr.'s, will and against the devisees and heirs of James Anderson, Jr. A number of amendments were filed, somewhat obscuring the purpose of the original suit, but from all of them we think its scope was to (1) have the trust created by the deeds of July 9, 1872, and of July, 1877, set aside and annulled, and to have the property described in the last-named deed conveyed to appellant in fee simple; or (2) if that could not be done, then to have the fourth clause of the trust deed of July, 1877, set aside and held for naught; (3) to require appellees Edmonia P. Anderson and Wilkins G. Anderson to settle their accounts as trustees, and to pay over to appellant any balance income on the trust property; (4) to have the trustees removed, and another appointed in their stead; (5) to have certain settlements theretofore made by the trustees surcharged. "Such further and other relief as to equity belongs" was also prayed for.

Appellees took the position that no trust was created until the transaction of July, 1877. It is true the deed of July 9, 1872, was in form a conveyance of the fee simple title. But it did not contain the whole of the agreement between the parties. The bond executed simultaneously is as much a part of the transaction as if set out in terms in the body of the deed. The true effect and intent of that proceeding, as between the parties to it, was to divest Brown Anderson of the legal title to, but reserve to him the beneficial use of, that property. Its fixed value was to be accounted for by the grantee to a named trustee of the

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grantor, and so paid that the full enjoyment of its use was insured to him during life, and that the value should go to his heirs at his death. This construction was undoubtedly the one in the minds of the parties, for when the deed of 1877 came to be made, at a time when James Anderson, Jr., was preparing to fix up his own affairs finally, we find him ridding his estate of the burden of providing the annuity required by the bond of 1872, and of binding Brown's property alone with its payment. So the transaction of July, 1877, confessedly creating a trust upon this identical property for the benefit of this identical beneficiary, was made to continue, although in somewhat altered form, the original purpose of the parties. Furthermore, if James Anderson, Jr., had failed prior to 1877 to comply with the terms of the bond, the chancellor, upon an application of Brown Anderson, would have subjected that property to the execution of the trust stipulated in the bond. We are of opinion that an express trust was created by the deed and bond of July 9, 1872 in behalf of appellant, and according to the terms of the bond. Howard v. Howard, 60 Vt., 362, 14 Atl., 702; Sargent v. Baldwin, 60 Vt., 17, 13 Atl., 854.

Appellant seeks to have the trust effected by these several instruments set aside, on the principal ground that the purpose of the trust or the reason for creating it no longer exists and that, therefore, he should be reinvested with the title to his own property. He says that the reason for creating the trust was because he was then dissipated, an inebriate; and that, to prevent his squandering his property, it was conveyed to be held in trust for his benefit. While it appears that appellaant was then an inebriate, and that now for twenty years or more he has been strictly sober, yet it does not appear anywhere that appellant's

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bibulous habits were the cause or consideration for creating the trust. If the instruments creating it had recited the reason, it would be clear that if that reason no longer existed, the property should be conveyed to the beneficial owner. Weakley, Trustee, v. Buckner, 91 Ky., 457; 13 R., 37; 16 S. W., 130; Brannin v. Sherley, 91 Ky., 450; 12 R., 977; 16 S. W., 94. But neither do the instruments say what was the moving cause for creating the trust, nor is that fact otherwise established in the record. Two of the principal actors—James Anderson, Jr., and Geo. W. Anderson, the original trustee—are dead, as is the distinguished attorney who prepared the papers of the 1877 transaction. We are not authorized by the state of the record to say that the reason or necessity which moved the creation of the trust no longer exists.

Other grounds adverted to in argument, though not very clearly or specifically set forth in the pleadings, are fraud or mistake in the execution of the papers. Of fraud there is no evidence. The evidence of mistake is too meager to entitle it to any great consideration. At best it is the statement of appellant that he did not then understand the instruments. That he may not have foreseen everything that has come to pass relating to his support from this property is likely enough; but that he had sufficient mind to comprehend the probable workings, as well as the general effect, of the transaction, there can be but little doubt. It was not provided in any of these papers for the revocation of the trust either by the settlor or by the *cestui que trust*. It is not claimed by appellant that such power of revocation was to exist, and that by oversight or mistake or otherwise it was omitted from the instruments as drafted. Indeed, the terms of the instruments themselves seem to contemplate that the arrangement would exist in whatever

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event, during the lifetime of the settlor. "The party who makes a voluntary deed, whether of real or personal estate, without reserving the power of altering or revoking it, has no right to disturb it, and as against himself it is valid and binding, both in equity and at law." Stone v. King, 7 R. I., 358, 84 Am. Dec., 557; Bunn v. Winthrop, 1 Johns, Ch. (N. Y.), 329; Sargent v. Baldwin, 60 Vt., 17, 13 Atl., 854; Salisbury v. Bigelow, 20 Pick. (Mass.), 174.

Appellant introduced evidence tending to show that he was now competent to manage and control his own estate, and testified that he was specially desirous of doing so. In Falk v. Turner, 101 Mass., 494, a married woman brought suit to set aside a deed of trust, by which, before her marriage, she had conveyed all her property to a trustee, for her exclusive benefit during her life, reserving the power of appointment by will, or, in default of such appointment, the proceeds of the estate to be paid to her children living at her death and the issue of any deceased children in equal shares. It was said by the court: "The bill avers that she now desires to regain the possession and management of the property, and has the ability to manage it. Nothing appears in the case to raise doubt as to her ability, either at present or when she made the deed. But the ability of the *cestui que trust* to manage the property, or his desire to do so, has never been recognized as a ground for setting aside a trust." 1 Perry on Trusts, section 104; Ingram v. Kirkpatrick, 41 N. C., 463, 51 Am. Dec., 428. Although appellant testifies that he did not have the benefit of legal advice in the preparation of the papers creating this trust, he admits that he did talk to Hon. James Speed about it, and it is pretty clearly shown that Mr. Speed was present in the capacity of an attorney when the papers of 1877 were prepared and acted in their preparation. But it was held

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in Riddle v. Cutter, 49 Iowa, 547, that the fact that the person making a voluntary settlement did not have independent legal advice did not warrant the setting aside of the trust, unless the beneficiary stood in some fiduciary capacity to the donor, or the trustee was benefited thereby. This was held in the case of a conveyance by a drunkard in trust for the support of his family. In this case the settlor was himself the chief beneficiary. In the trust as originally created the trustee derived no benefit from it. By the alteration of the terms in 1877 the substituted trustees took no greater interest than they had before (under the construction and correction herein given that instrument), and their interest in any event was contingent and inchoate. We are of opinion, upon authority, that a trust not revocable by its terms, understandingly entered into by the parties, and free from fraud, can not be revoked at the caprice or whim of any of the parties, without the consent of all. The authorities are equally clear and uniform that, where such a trust has been once created, it is beyond the power of the settlor to alter its terms or beneficiaries, save by the consent of the *cestui que trust.* Therefore the attempted change by the deed of 1877 of the ultimate beneficiaries, who were to take the remainder of the estate created by the first instrument of 1872 from the heirs of Brown Anderson to those of James Anderson, Jr., was invalid. Perry on Trusts, section 104; Ingram v. Kirkpatrick, supra; Ewing v. Warner, 47 Minn., 446, 50 N. W., 603; Ewing v. Jones, 130 Ind., 247; 29 N. E., 1057, 15 L. R. A., 75; Rife's Appeal, 110 Pa., 232, 1 Atl., 226; Howard v. Howard, supra; Hildreth v. Eliot, 8 Pick., 293; Hellman v. McWilliams, 70 Cal., 449, 11 Pac., 659. The *cestui que trust* who was entitled to the whole of the net income of the trust estate during his life may consent, where he is not under legal disability, to a

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change of the terms of the trust, but not so as to affect the other beneficiaries. Therefore it was competent for appellant to have consented to change the annuity of $500 to one providing for the whole of the net income of the estate necessary for his support. Whether the change of the investment from personalty to realty made by the instrument of 1877 will be approved on a final settlement of the trust will depend upon the conditions existing when that event shall occur.

In view of these conclusions it is not necessary to notice certain pleas of limitation in the record.

In so far as this action sought a surcharging of the settlement of the trustees' accounts, there was no averment of any error or omission of the trustees to charge themselves properly in any of the settlements previously made, nor is there evidence of such error or omission. In the settlement made in this case by the trustees the transactions seem to have been particularly careful and clearly proper. The settlement is full and explicit and no specific charge is made of any irregularity therein.

Appellant complains at the treatment received at the hands of his trustees and charges that their relations are so strained that it is improper that they should be continued. So far as his treatment at the hands of his trustees is concerned, the record discloses that they have managed his estate with strict fidelity, and with unusual ability. It has increased in value and in earning capacity. It has been changed under the power of the deed from an unproductive estate to one that has yielded a support sufficient to have maintained appellant despite the fact that he has been unable to do anything toward his own support. This has entailed upon the trustees considerable labor, great vigilance, and on numerous occasions the advance-

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ment of their private means to the accommodation of appellant's wants. In this way, as well as by reason of certain needed improvements made upon the property so as to make it productive, the income of the estate has been anticipated, and by the judgment of the court these excessive expenditures have been adjudged to appellee trustees as a charge against the income but subordinate to the support of the appellant. The relations between the trustees and appellant do not appear to be at all cordial. Yet it does not appear that the trustees have failed in any instance to provide appellant with every necessity that the estate would afford—even more. They have kept him strictly within his income—as they should have done—save when, for some reason, the income was abnormally reduced for the time being—as by the property being without tenants, etc. More than a punctual, scrupulous administration of the trust is not required. It does not matter so much what was the state of feeling between the parties, so long as it did not interfere with a just and proper discharge of the fiducial duties. Appellant's own conduct and misjudgment of the trustees is doubtless responsible for much that he feels towards them.

It is complained that by the judgment the net income is so reduced as that it is insufficient to support appellant with even the bare necessities of life. We do not so read the judgment. While it authorizes the appropriation of one-half of the net income to the repayment to appellees of the several sums adjudged them in the action in the way of advancements, yet it is expressly adjudged that this is subject to the original trust; that is, the support of appellant. This means, of course, that if one-half of the net income should not be sufficient for his support, then he must

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be supported out of the income, as far as it is possible, even to the postponement of appellees' judgment debts.

The judgment of the circuit court having been in accord with these views, it is affirmed.

CASE 31—ACTION BY W. L. HURST AGAINST SARAH DAVIDSON AND OTHERS FOR A SETTLEMENT OF THE ESTATE OF JOHN A. DUFF, DECEASED.—OCT. 2.

Hurst v. Davidson and Others.

APPEAL FROM PERRY CIRCUIT COURT.

FROM A JUDGMENT OF DISMISSAL THE PLAINTIFF, W. L. HURST, APPEALS. REVERSED.

WILLS—CONSTRUCTION—RIGHTS OF CREDITORS—BONA FIDE PURCHASERS OF DEVISED ESTATE—LIEN OF CREDITOR UNDER THE WILL.

Held: 1. Where a will directs the executor to sell the real and personal estate, and from the proceeds to pay the testator's debts and a sufficient amount to his widow for her support, and to distribute the remainder to his children, the children can not, by agreeing among themselves on a division of the real estate, instead of taking its proceeds, defeat the rights of the creditors to be paid before anything passes to the children.

2. Where a will directs the executor to sell the real estate, and distribute the proceeds, after making certain payments, between the children of the testator, the mere partition of the land by the children among themselves does not constitute them bona fide purchasers, within Kentucky Statutes, 1899, section 2087, providing that a devised estate, when sold, shall not be liable to the creditors of the testator in the hands of bona fide purchasers, unless action is instituted within six months after the estate is devised.

3. Kentucky Statutes, 1899, section 2087, which provides that a devised estate, when sold, shall not be liable to the creditors of the testator in the hands of a bona fide purchaser unless action is instituted within six months after the estate is devised, being intended to protect a devisee in the sale of what is devised, has no application where a will directs the executor to sell the real

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estate, and distribute the remainder of the proceeds, after the payment of debts and a sufficient amount to support the widow, between the testator's children.

4. Under Kentucky Statutes, 1899, section 2066, providing that when any property is devised subject to the payment by the devisee to another of a sum of money, the latter shall have a lien on the legacy for the sum to be paid, and section 467, providing that the word "legacy" includes either real or personal estate, the creditors of a testator, which directs by his will that his executor shall sell his real and personal estate, and from the proceeds to pay his debts, etc., and distribute the remainder between his children, have, on the recording of the will, a lien of record on the land for their debts.

W. L. HURST AND HAZELRIGG & CHENAULT, FOR APPELLANT, HURST.

Plaintiff Hurst filed this suit in November, 1898, for a settlement of the estate of John A. Duff, deceased, alleging that he left no personal estate except such as was assigned to his widow, and in which he seeks to subject the real estate of said decedent to the payment of plaintiff's debt, and alleging that the heirs of decedent had made an arrangement among themselves to partition the land and had done so, and had conveyances made to each other, and were claiming to be bona fide purchasers of the land, and that it was not subject to the payment of their ancestor's debts by reason of the delay of plaintiff in bringing his action. The lower court sustained a demurrer to plaintiff's petition, and after doing so subsequently gave him a judgment for his debt, but denied him the relief he sought in subjecting the land of decedent to the payment of his debt.

The decedent left a will by which he directed that all his land and personal property be sold, and out of the proceeds his debts should be paid.

This provision of the will was entirely ignored by the executor and heirs, and, as stated, the heirs divided the land and now claim it is not subject to plaintiff's debt.

We claim that under the will the creditors of the decedent are given the right to have their debts paid out of the land, the personal estate being insufficient therefor, and that this right can not be defeated by any collusion or arrangement by the heirs in having the land divided and deeds of partition made to each other.

AUTHORITIES CITED.

Alexander v. Kemel, 81 Ky., 348; Ky. Stats., secs. 2067 and 813; Civil Code, secs. 428, 519, 520 and 603.

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J. J. C. BACH, W. H. MILLER AND L. H. M. SALYER, FOR APPELLEES.

1. In this case no action was instituted to settle the estate until after the lapse of nearly seven years after it was devised.
2. It is not denied that the appellees are bona fide purchasers of the land for a valuable consideration.
3. It can not be seriously contended that the judgment dismissing appellant's petition so far as it sought to subject the land was improper.
4. The judgment appealed from is not a final order, it being merely an expression of an opinion that the creditors should exhaust the other property before interfering with that which had been divided among the devisees.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

Appellant, Hurst, on November 19, 1898, filed his petition in equity in the Perry circuit court, alleging that in the year 1892 John A. Duff died a resident of Perry county, leaving, surviving him, Polly Duff, his widow, who has since died, also a number of children and grandchildren, his heirs at law, who were made defendants to the action. He also alleged that the decedent left a will, which had been duly probated, by which he directed that all his property, real and personal, should be sold by his executor, and that out of the proceeds the executor should make certain provision for his widow, and pay all his debts, and after this was done divide the remainder of the proceeds in a certain manner among his descendants. The executor was made a defendant to the petition, and it was charged that there was no personal estate, but that the decedent owned a large and valuable tract of land in Perry county, which was then in the possession of the children or those claiming under them. He alleged that he was a creditor of the decedent, setting out in detail his debt, which had been duly proven up and demanded of the executor. He further alleged that

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the executor had made no settlement of his accounts, and that a sale of the land, or part of it, would be necessary to pay the debts. He prayed a settlement of the estate, and for a sale of enough of the land for this purpose. A few days afterwards the personal representative filed a similar suit. The court sustained a demurrer to Hurst's petition, for what reason is not shown, but thereafter, treating the case as still in court, consolidated it with the suit brought by the personal representative and another suit which had been brought by a creditor of some of the children against them. The consolidated actions were referred to a commissioner, who reported the debts against the estate, also that the personal estate in the hands of the representative was exhausted, and the court thereupon entered a judgment dismissing the petition of the representative and Hurst, so far as they sought to subject the land to the debts of the decedent, on the ground, as stated in the judgment, "that the will of John A. Duff, Sr., deceased, confers upon the plaintiff, E. C. Duff, Sr., as administrator of his estate, the mere naked power to sell or convey and distribute the proceeds of the sale of his realty among his devisees, and that the title to his realty vested in them, and not in the administrator; and it appearing to the satisfaction of the court that the devisees and their vendees partitioned the land hereinafter described among themselves, and made to each other conveyance for their respective parts more than six months after the qualification of the administrator, and before any suit was instituted to settle the estate, they thereby elected to take their interest in said estate in land instead of in money—the proceeds of the sale of same—and thereby become *bona fide* purchasers for a valuable consideration, and that the same is not liable for the debts of the creditors."

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The propriety of this judgment is the only question we deem it necessary to determine on the appeal. The will of the testator, so far as material, is in these words: "After my death, I will that all of my property and effects, both real and personal and mixed, that I own at my death, be sold as hereinafter described and the proceeds of the sale of all my property and all the debts be collected and disposed of and paid out as follows: I first desire and will that myself and wife be decently buried, all my just debts be paid, and second I desire that if my beloved wife, Polly Duff, if she should outlive me, I in that event will that my said wife, Polly Duff, have a sufficient amount of my effects set apart to her to amply support her during her life, and that she select who she will live with, then after my just debts are paid and my said wife is amply provided for, I will that the remainder of the proceeds of all my effects be divided among my children as follows: [Here follow directions for a distribution.] In order to carry out this my last will and testament I appoint and make my son, Elijah C. Duff, my executor to carry out my will and my said executor is hereby directed and empowered to make sale of all the real and personal estate I have or own at my death and is hereby empowered and directed to sell and make a deed or deeds to all of my real estate to have the same force and effect as if I was to make deeds of conveyance in my lifetime to said land."

In Duff's Ex'r v. Duff, 21 R., 1211, 54 S. W., 711, it was held that, under this will, the land is to be treated as personalty in the hands of the executor for distribution, and that, therefore, he might protect it from trespass; but the court added: "The rule might be otherwise if, as intimated by counsel, the appellee entered on the land as one of the heirs or devisees. In such event, under some circum-

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stances, he might be regarded as having elected to take the land, or his share of it, instead of the proceeds." But in that case no question of the rights of creditors was involved. It was simply a controversy between the executor and one of the heirs and devisees. The right of the devisees to agree among themselves on a division of the land, and to take the land instead of its proceeds, is subject to the rights of creditors; for, under the will, the entire estate, or the proceeds of it, are charged, first, with the burial expenses of the testator and his wife, and then with the payment of his debts. Only the remainder, after the payment of these charges and the support of the widow, should she survive the testator, is devised to the children. The children, under the will, take subject to the payment of the debts, and, if they elected to take land instead of money, they would hold the land subject to the trust created by the will in favor of the creditors, who, by its terms, are to be first paid before anything goes to the devisees. The devisees could not, by any arrangement among themselves, defeat the prior rights of the creditors, nor could they do so by reason of any nonaction on the part of the executor, who held the estate as trustee for the creditors.

In Drake v. Ellman, 80 Ky., 434, 4 R., 269, it was held under a similar will that the children were residuary devisees after the payment of the debts, and that the creditors had a prior lien upon the estate. In entering the judgment appealed from, the court seems to have based his action on section 2087, Kentucky Statutes, 1899. "When the heir or devisee shall alien, before suit brought, the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation, to the creditors of the decedent or testator; but the estate so aliened shall not be liable to the creditors in the hands of a *bona fide*

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purchaser for valuable consideration, unless action is instituted within six months after the estate is devised or descended to subject the same." The mere partition of the land by the children among themselves did not constitute them *bona fide* purchasers. They held the land after that partition subject to the rights of creditors, just as they held it before. Besides, this section had no application. The land did not descend to the children, for it was devised by the testator to be sold. The land was not devised to the children, and they did not, therefore, take it as heirs of the testator, or as devisees. The children took nothing under the will, except as residuary devisees of the proceeds of the sale of the property by the executor after the debts were paid. In so far as the children aliened anything more than the surplus remaining after the payment of the debts and the other preferred charges, they aliened that which was not devised to them, and to which they had not the complete title. The statute is only intended to protect the devisee in the sale of what is devised to him. It was not intended to enable him, after six months without suit brought, to sell what was not his under the will. Section 2066, Kentucky Statutes, 1899, provides: "When any property shall be devised subject to or upon the payment of the devisee to another of a sum of money or his doing some other thing, the latter shall have a lien upon the legacy for the sum so to be paid, or for the value of the thing to be done," By section 467, Kentucky Statutes, 1899, the word "legacy" includes either real or personal estate. The creditors, therefore, as the will was recorded, had a lien of record on the land for their debts. The children had no title from the executor. The rule that a purchaser of land charged generally with the payment of debts need not look to the application of the purchase money (see Grotenkemper v.

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Bryson *et al.*, 79 Ky., 353, 4 R., 888; Drake v. Ellman, supra, has no relevancy to the case before us, as the will directed the land to be sold by the executor, and no purchase was made from him. If any one purchased from one of the heirs, he did so with notice of the state of the title, and therefore stands in no better attitude than his vendor.

We are therefore of the opinion that on the facts shown the court should have directed a sale of enough of the land to pay the testator's debts.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

Petition by appellees for modification of opinion overruled.

CASE 32—INDICTMENT AGAINST DR. J. D. MCCONNELL FOR FAILING TO KEEP A REGISTRY OF BIRTHS AND DEATHS AT WHICH HE HAS PROFESSIONALLY ATTENDED.—OCT. 2.

Commonwealth v. McConnell.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

DEMURRER TO INDICTMENT SUSTAINED AND COMMONWEALTH APPEALS. AFFIRMED.

BIRTHS AND DEATHS—REGISTRY—DUTY OF PHYSICIANS—TITLE OF STATUTE—SUFFICIENCY OF INDICTMENT.

Held: 1. The title of an act, "An act to provide for the registration of marriages, births and death" (Acts 1873-74, p. 13, chap. 134), is sufficient to authorize the provision in the act requiring physicians to keep a registry of births and deaths at which they have professionally attended, and to deposit a copy in the county clerk's office.

2. Acts 1873-74, p. 13, chap. 134, is not unconstitutional because requiring physicians, without compensation, to keep a registry of births and deaths at which they have attended professionally, and to deposit a copy in the county clerk's office; this being within the police power.

3. An indictment against a physician under Acts 1873-74, p. 13,

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chap. 134, for failure to keep a registry of births and deaths at which he has attended professionally, and to deposit a copy in the county clerk's office, is defective in not charging that he ever attended at any birth or death.

4. The allegation of an indictment under Acts 1873-74, p. 13, chap. 134, requiring physicians to keep a registry of births and deaths at which they have attended professionally, that defendant "is a physician," speaks from the time of the indictment, and is not a sufficient allegation that he was a physician during the year then ended, for which it was charged he failed to do his duty.

C. J. PRATT, ATTORNEY GENERAL, AND McKENZIE TODD, FOR APPELLANT.

The indictment in this case charges appellee with failing to deposit in the county clerk's office of Crittenden county, on or before the 10th day of January, 1902, a registry or copy thereof of the births of persons and deaths of persons at which he professionally attended in Crittenden county, Kentucky, embracing a period of one year on the 31st day of December.

The indictment further alleges that appellee is a regular practicing physician, being registered in the county clerk's office as such and having a certificate of authority to practice medicine from the State Board of Health of the State of Kentucky.

We contend that it was not necessary for the indictment to aver that the appellee attended professionally births or deaths upon which he was required to make the report; nor was it necessary to allege that he was the only physician present; if he attended such cases, it was his duty by reason of that fact to make said report.

It was not necessary to show in the indictment that appellee was furnished the necessary blanks by appellant to make said reports. The only material and necessary allegations in an indictment of this offense, are alleged in conformity to sections 2582 and 2583 of the Kentucky Statutes.

The gist of the action is the failure to make the report as required by sections 2582 and 2583 of the Kentucky Statutes. Section 2589 provides that "Any person failing to discharge and perform any of the acts or duties herein imposed and required to be done, shall, for every such failure, be fined in a sum not less than five nor more than twenty dollars, to be recovered by warrant before a justice of the peace or by presentment by the grand jury."

The acts and duties of a physician under this chapter is to make the report and file with the county clerk on or before the 10th day of January in each year.

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JAMES & JAMES AND A. C. MOORE, FOR APPELLEE.

(1) The indictment nowhere alleges that appellee ever, at any time, attended at any births or deaths in Crittenden county, or (2) that he was the oldest physician present or the only one present, or (3) it does not allege that the State Auditor ever caused to be printed any blanks for the use of physicians, or that the county clerk ever had or furnished the appellee such blanks on which to make the reports named.

Hence, we take it that appellant is estopped to complain that appellee has failed to perform a duty which appellant imposes to be done upon blanks and appliances to be furnished by appellant.

AUTHORITIES CITED.

Criminal Code, sec. 124, subsecs. 1, 2, 3 and 4; Ky. Stats., secs. 2581, 2583 and 2585; 9 Bush, 178 to 181.

GORDON, GORDON & COX, FOR APPELLEE.

We question the validity of the action on constitutional grounds.

The title of the act does not suggest the status of the persons who are to compile the registry; it does not mention the words physicians or midwives in the title, nor does the title contain any intimation of a penalty; and taken in connection with the place of its occurrence or location in the Kentucky Statutes under the head of Marriages, Births and Deaths, &c., it is positively misleading.

2. The act requires the performance of a public service by a private citizen without providing for compensation for such service.

3. The indictment does not charge that the defendant professionally attended on births or deaths. Davis v. Commonwealth, 13 Bush, 318.

OPINION OF THE COURT BY JUDGE BARKER—AFFIRMING.

The following indictment was returned against the appellee by the grand jurors of the county of Crittenden on the 1st day of April, 1902: "The grand jurors of the county of Crittenden, in the name and by the authority of the Commonwealth of Kentucky, accuse Dr. J. D. McConnell of the offense of failing to deposit in the county clerk's office of Crittenden county, Kentucky, a registry or copy thereof

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of the births and deaths he professionally attended in such county, committed in manner and form as follows, viz.: The said McConnell, in the said county of Crittenden, on the 1st day of March, 1902, and before the finding of this indictment, did fail to deposit in the county clerk's office of Crittenden county, Kentucky, on or before the 10th day of January, 1902, a registry or copy thereof of the births of persons and deaths of persons at which he professionally attended in Crittenden county, Kentucky, embracing a period of one year, ending on the 31st day of December, 1901. The grand jury further find that Dr. J. D. McConnell is a regular practicing physician, he having exhibited and registered in the county clerk's office of Crittenden county, Kentucky, a certificate of authority to practice medicine from the State Board of Health of the State of Kentucky, against the peace and dignity of the Commonwealth of Kentucky." This indictment is based upon the following provisions of the statute (being sections 2582 and 2583, c. 83, of the Kentucky Statutes of 1899):

"Sec. 2582. It shall be the duty of all physicians, surgeons and midwives to keep a registry of all births and deaths at which they have professionally attended, showing, in cases of birth, the time and place of birth, name of the father, and the maiden name of the mother, and their residence, sex and color of the child, together with its name, if it shall receive one, and whether it was born alive or dead; and showing in cases of death, the time, place and cause of death, the name, age, sex, color and condition (whether single, married or widowed), name and surname of parents, occupation, residence and place of birth of the deceased: provided further, that when two or more physicians, surgeons or midwives may have attended profession-

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ally at any birth or death, that physician, surgeon or midwife who is oldest in attendance shall make the registry.

"Sec. 2583. It shall be the duty of the clergymen, physicians, etc., above named, to deposit in the county clerk's office of the counties in which such births, etc., occur, on or before the tenth day of January, in every year, the said registry, or a copy thereof, embracing the period of one year, ending on the thirty-first day of December last preceding the time of deposit; and the clerk shall deliver copies of the same to the assessor."

A general demurrer was filed to this indictment, which the court sustained, and dismissed it. From this judgment the Commonwealth has appealed.

Counsel for appellee insist that the act upon which the indictment is predicated is unconstitutional, because the subject-matter is not indicated by its title. To this proposition we are unable to agree. The original act is to be found in volume 1 of the Acts of the General Assembly of the Commonwealth of Kentucky for 1873-74, p. 13, c. 134, its title being "An act to provide for the registration of marriages, births and deaths." The subject-matter of the act is the registry of marriages, births and deaths, and is clearly germane to the title. The fact that there is no mention of physicians in the title does not militate against this view. It is not possible to put the entire body of the act in the title. The constitutional requirement is fully met and complied with if the general scope and purpose of the act is germane to its title; and we think this condition exists in the statute under consideration.

It is also urged by appellee's counsel that the act is unconstitutional because it requires physicians to perform a service without compensation, and that the Legislature had no power so to do. The public is deeply interested in the

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subject of the proper registry of marriages, births and deaths, and we have no doubt that under the police power of the Commonwealth the Legislature has authority to require of the professional parties in charge of the performance of the duty of returning to the county clerk's office proper certificates in relation thereto. There are, however, objections raised by appellee to the indictment which we think are substantial: First. It is nowhere charged that the appellee ever attended as physician at any birth or death. It is alleged that he failed to return to the county clerk's office, on or before the day required by the statute, the registry or copy thereof which the law requires every physician to make; but there is an utter failure to charge upon appellee that he had attended professionally at any such birth or death. Second. It is not alleged in the indictment that appellee was a practicing physician during the yearly period for which he should have kept and returned the registry required by the statute. The year for which it is charged the registry should have been kept and deposited extended from the 31st day of December, 1900, to the 31st day of December, 1901. The indictment charged that "the grand jury further find that Dr. J. D. McConnell is a regular practicing physician, he having exhibited and registered in the county clerk's office of Crittenden county, Kentucky, a certificate of authority to practice medicine from the State Board of Health of the State of Kentucky." This allegation, that appellee "is a regular practicing physician," being in the present tense, speaks from the time the indictment was returned, which was on the 1st day of April, 1902. It may be true that appellee was a regular practicing physician on the 1st day of April, 1902, but it does not therefore follow that he was a practicing physician during the

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year between the 31st day of December, 1900, and the 31st day of December, 1901.

For these reasons, we think the indictment was clearly defective, and the demurrer thereto was properly sustained; wherefore the judgment is affirmed.

CASE 33—ACTION BY THE COLUMBIA FINANCE & TRUST COMPANY AGAINST THE FIRST NATIONAL BANK.—OCT. 7.

116 364
124 211
116 364
132 531

Columbia Finance & Trust Co. v. First National Bank.

APPEAL FROM JEFFERSON CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

ASSIGNMENTS—ASSIGNMENT OF CHOSE IN ACTION—PARTIAL ASSIGNMENT—NOTICE TO CREDITOR—PRIORITY—EVIDENCE—DEPOSIT OF JOINT FUND—PARTNERSHIP—TRUST FUNDS.

Held: 1. Where several persons make a deposit in a bank to their joint credit, the bank must have the signatures of all of them appended to a check before it is authorized to pay it.

2. Where moneys belonging to a firm are deposited in a bank, a member thereof can not employ any part of such funds to pay his debt to the bank without the consent of the remainder of the firm.

3. If a depositor of trust funds appropriates them to the payment of his individual debt to the bank, the latter, having notice of the character of the fund, is affected with knowledge of the misappropriation, and may be compelled to refund.

4. An assignment by a member of a firm, in payment of his personal debt, of a portion of a sum owing the firm, which is consented to by the other partner, is of as much validity as if the assignment had been made in the name of the firm.

5. As between successive assignees of the same chose in action, the order of time, rather than the order in which notice is given to the debtor, controls the preference.

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6. Civil Code, section 19, provides that in the case of an assignment of a thing in action, the action by the assignee is without prejudice of any discount, set-off, or defense now allowed, and Kentucky Statutes, 1899, section 474, provides that on the assignment of a bond or bill for money the assignee's action is without prejudice to any defense the debtor had before notice. HELD, that an assignee's right of action on the assignment of a chose in action is without prejudice to any discount, &c., the debtor has before notice of the assignment.
7. Where a member of a firm assigned his interest in a sum owing the firm, which assignment was consented to by the other member of the firm, though the assignment was partial, it being afterwards assented to by the debtor, and the debtor not complaining, the assignment would be protected in equity as against a subsequent assignee of the same interest.
8. The failure of an assignee of a chose in action to give notice to the debtor, having prejudiced no right, is immaterial in a suit wherein he seeks to enforce his assignment.
9. The fact that a bank, when a check was drawn on it, claimed not to have the money on hand, did not prevent the application of the rule that the holder of an unaccepted check may maintain an action thereon.
10. One of a firm of attorneys borrowed money of a bank, assigning as security therefor his share of a fee owing the firm by A. Subsequently he assigned his share of such fee to a trust company, and the other partner assigned to the trust company, to secure a loan, his share of the same fee and his share in another fee owing the firm by B. Thereafter a sum of money, from which it was understood the fee owing by A. was to be paid, came into the hands of the bank. HELD, that the bank not being a creditor of the latter partner, the trust company could not be compelled to first exhaust the fund arising from the fee owing by B.

FIRTLE, TRABUE & COX, HENRY L. STONE AND ALBERT S. BRANDEIS, ATTORNEYS FOR APPELLANT.

We submit that the rule in this case, which is decisive of the whole controversy, is a very simple one. To adopt an analogy from mathematics, we may put it in this form:

Where one quantity, A, is greater than another quantity, B, which in turn is greater than a third quantity, C, the first quantity, A, must be greater than the smallest quantity, C. The claim of appellant, by reason of the assignments to it of the entire fund by the united action of all the partners was greater, better, and superior to the claim of members of the firm and

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of the firm creditors. The claim of firm creditors to the fund was admittedly greater than the claim of the assignee or transferee of a single member of the firm; that is, the firm creditors had a better right to the fund than did the bank, by reason of its assignments from Sudduth alone. If, then, the claim of appellant is better, superior, and greater than the claim of firm creditors, and the claim of firm creditors is better, greater, and superior to the claim of the bank, it follows by the rigor of a demonstration that the claim of appellant must be greater, superior, and better than that of the bank. All other matters simply becloud this one question, but they can not remove it nor take from it the fact that in it is the real solution of the controversy here presented. There is no way in which the claim of the bank can rise higher than its source, and Sudduth had no power to vest his assignee with a right or property equal in strength or in security to that with which all the partners joining by their united action invested the appellant.

For the reasons urged and upon the authorities cited, we respectfully submit that the judgment appealed from should be reversed with direction to the court below to enter judgment for appellant against the appellee for the amount of the checks sued on, with interest thereon from the dates the same were presented and payment thereof demanded.

AUTHORITIES CITED.

1. Appellant's right to maintain this action as the holder of the checks sued on. Lester & Co. v. Given, Jones & Co., 8 Bush, 357; Chambers v. Northern Bank of Ky., 5 R., 123; Herndon v. Louisville Banking Co., 10 R., 585; Merchants' National Bank v. Robinson, 97 Ky., 552; Kentucky Flour Co.'s Assignee v. Merchants 'National Bank, 90 Ky., 225; Weiands' Admr. v. State National Bank, 23 R., 1517; 5 Am. & Eng. Ency. of Law 2d ed., p. 1061; Weinstock v. Bellwood, 12 Bush, 139.

2. The insufficiency of the defenses interposed by appellee. Pomeroy's Equity Jurisprudence, vol. 1, sec. 414; sec. 1277, note 1; secs. 683, 684, 685; Rice v. Rice, 2 Drew, 73; Mandeville v. Welsh, 5 Wheat., 277; Weinstock v. Bellwood, 12 Bush, 139; Bullitt's Civil Code, note to sec. 18; Hayward v. Andrews, 106 U. S., 672; New York Guaranty & Ind. Co. v. Memphis Water Co., 107 U. S., 214; Smith v. Bourbon County, 127 U. S., 111; Glenn v. Marbury, 145 U. S., 508; Bay v. Coddington, 5 Johns Ch. Rep., 54; Swift v. Tyson, 16 Peters, 1; Lee's Admr. v. Snead, Collard & Hughes, 1 Met., 628; May v. Quimby & Co., 3 Bush, 96; Greenwell v. Haydon, 78 Ky., 332; People's Savings Bank v. Bates, 120 U. S., 556; Fourth National Bank

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v. New Orleans & Carrollton Railroad Co., 11 Wallace, 624; Couchman v. Maupin, 78 Ky., 33; Jones v. Lusk, 2 Met., 301; King v. Shaw, 9 R., 577; Jackson v. Holloway, 14 B. Mon., 108-112; Kincaid v. National Wall Paper Co. (Kan)., 54 L. R. A., 412; Annotation in 29 L. R. A., 681, 692, to assigned estate of Edwards & Wigginton, 122 Mo., 426.

3. The appellee bank had no right to set off the individual debt of Sudduth due to it against any part of the deposit to the credit of H. L. Stone, W. A. Sudduth and Bennett H. Young, president. 3 Am. & Eng. Ency. of Law, 2d ed., 835; Farmers' Bank v. Farwell, 58 Fed. Rep., 634; Coote v. Bank, 3 Cranch (C. C.), 95; Morse on Banks and Banking, 2d ed., 48; Zane on Banks and Banking, par. 140; Hodgin v. People's National Bank, 124 N. C., 543 (1899); Watts v. Christie, 11 Beav., 555; Reynes v. Dumont, 130 U. S., 354; Masonic Savings Bank v. Bang's Admr., 84 Ky., 135; Raymond, &c., v. Palmer, &c., 41 La. Ann., 432; Lindley on Partnership, p. 292, ed. 1888; Williams v. Brimhall, 13 Gray, 452; Cotzhausen v. Judd, 43 Wis., 213; McNair v. Platt, 45 Ill., 211; Brewster v. Mott, 3 Scam., 378; Hilliard v. Walker, 11 Ill., 644; Thomas v. Stetson, 62 Ia., 537; Witherington v. Huntsman, 44 S. W., 74; 64 Ark., 551; Smith v. Brannon, 51 S. W., 128; 21 R., 267; West v. Armstrong, 4 R., 998; Cochran & Fulton v. Anderson Co., National Bank, 6 R., 168; Flanagan v. Shuck, 82 Ky., 617; Eubank v. Vance, 6 R., 303; Pennell v. Deffell, 4 DeGex, M. & G., 372, 383; Firth v. Cartland; 2 Hem. & M., 420; Van Alen v. American National Bank, 52 N. Y., 1; Skilman v. Miller, 7 Bush, 428.

4. Sudduth had no power or authority as a member and in the name of the law firm of Stone & Sudduth to discount or endorse the Story note to the appellee bank, or to waive protest or notice of protest thereon so as to bind the firm or Stone, the other member of said firm. Breckinridge v. Shreve, 4 Dana, 375; Judge v. Braswell, 13 Bush, 67; 3 Am. & Eng. Ency. of Law, 2d ed., 473; Alsop v. Central Trust Company, 100 Ky., 375; Hedly v. Bainbridge, 3 Ad. & El., 315; Garland v. Jacomb, L. Rep., 8 Exch., 216; Dickinson v. Valpy, 10 Barn. & Cress., 128; Levy v. Pyne, 1 Car. & Marsh, 453; Smith v. Sloane, 37 Wis., 285; Chalmer's Digest of the Laws of Bills of Exchange, Promissory Notes and Checks, pp. 68, 69; Randall v. Lee, 68 Mo. App., 565; Moynahan v. Prentiss, 51 Pac., 94; Friend v. Duryee, 17 Flor., 116; Cowles v. McVicker, 3 Wis., 637-643; Nicholson v. Bank of New Orleans, 92 Ky., 255.

5. Appellee violated the agreement upon which the deposit was made when it appropriated the sum of $6,725.86 out of said deposit upon Sudduth's individual debt to appellee. Sec. 13

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of Zane on Banks and Banking; Morse on Banks and Banking, p. 42.

6. As to the accounting. Lindley on Partnership, star page 340; Bates on Partnership, sec. 185, p. 188; Mutual Benefit Life Insurance Co. v. First National Bank, 24 R., 580.

MATT. O'DOHERTY, FOR APPELLEE.

1. Sudduth's authority and direction to appellee to apply the fees in its hands to the satisfaction of his and Stone's obligations to the appellee, and the application thereof made by the appellee pursuant thereto, and without any notice of appellant's claim amounted to a payment of the money by Sudduth to appellee.

The controversy here is not therefore between two holders of conflicting assignments, but between the holder of a mere assignment and one to whom the money has been paid.

2. If the assignments to appellant were binding on the construction company, as contended for by appellant's counsel, then appellant has a claim against that company but not against appellee. The appellant had no lien upon the fund. Money has no ear marks.

3. Sudduth had undoubted right to direct the application of his one-half of the fees in appellee's hands to the payment of his obligations to appellee. The appellee, with or without Sudduth's direction, had the right to apply the moneys of Stone and Sudduth, or of either of them, in its hands to the payment of the Story discount.

4. The appellant can not question Sudduth's right to discount the Story note. Sudduth's partner only, Stone, could raise the question at all. Stone is not a party to the action, and if he were, and the question was presented by him, it would be decided in appellee's favor. Stone could not even raise the question unless and until upon a final settlement of the partnership of Stone and Sudduth it should appear that Sudduth is indebted to him, and then only to the amount of said indebtedness.

5. The appellant has failed to show by averment or proof that Sudduth's note of $3,000, or Stone's note of $4,000 is unpaid, while the exhibits filed by appellant show affirmatively that Sudduth's note is paid.

6. The appellant did not receive the checks sued on in the usual course of business. It is not a *bona fide* holder thereof for value or without notice. Treating them as attempted assignments of the moneys in appellee's hands, they were received by appellant with full notice of the prior assignment of the moneys to appellee and of their appropriation and payment to appellee.

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The checks on their face called for "Sudduth's one-half of the fee" and "Stone's one-half of the fee of Stone & Sudduth," and appellant knew when it received the checks that the fees in question had been paid to appellee and that the checks would not be paid. The facts do not bring the case within the rule established by Lester & Co. v. Given, Jones & Co., 8 Bush, 361, which enables the *bona fide* holder of a check received in the ordinary course of business to sue the bank in case of a wanton or fraudulent refusal to pay a check so received.

The refusal of the bank to honor the checks sued on in this case was neither wanton nor fraudulent, but was precisely what appellant knew would occur when it received and presented the checks to appellee.

We earnestly and confidently ask an affirmance of the judgment.

AUTHORITIES CITED.

Spencer's Equity Maxim; Buckner v. Sayre, 18 B. M., 756; Winlock v. Bellwood, 12 Bush, 139; Mandeville v. Welsh, 5 Wheaton, 283 (opinion U. S. S. Ct.); Beach on Mod. Equity Jur., sec. 233; Newly et al. v. Hull, 2 Met., 532; Purcefull v. Pineville Bank, 17 R., 38; Herndon v. Lou. Banking Co., 10 R., 584; Bank v. Bongs, 8 R., 18; Jackson v. Holloway, 14 B. M., 136; Bank of Rep. v. Millard, 10 Wall (U. S.), 152; First Nat. Bk. v. Whitman, 94 U. S., 343; Seventh Nat. Bk. v. Cook, 73 Penn. St., 483; Etna Nat. Bk. v. Fourth Nat. Bk., 46 N. Y., 82; Carr v. Security Bk., 107 Mass., 45; Criveling v. Bloomsberg Nat. Bk., 46 N. J. L., 255; Commercial Bk. v. Miller, 77 Ala., 168; 2 Parson on Bills and Notes, p. 81; Breckinridge v. Shreve, 4 Dana, 371; Judge et al. v. Braswell, 13 Bush, 70; Breckinridge v. Shreve, 4 Dana, 377; Ky. Stats., sec. 483; Moody v. Wiley, 3 R., 315; LaCompt v. Litcher, 11 Ky. R., 362; Roberts v. Armstrong's Admr., 1 Bush, 263; Ky. Stats., sec. 374; Civil Code, sec. 19; Am. & Eng. Ency., vol. 13, pp. 575-7; Boetcher v. Colorado Nat. Bk., 15 Col., 16; Spain v. Brent, 1 Wall (U. S.), 604; Schupp & Schmidt v. Thomasson's Exr., 9 R., 360; Bank of Ky. v. Vance, 4 Litt., 175; Swigert v. Bank of Ky., 17 B. M., 285; Glass v. Pullen, 6 Bush, 349; Carlisle v. Jumper, &c., 81 Ky., 285; Garrott v. Jaffrey & Co., 10 Bush, 417; Voorhis, &c., v. Eiting, 15 R., 162.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

Henry L. Stone and Watson A. Sudduth, two members of the Louisville bar, formed a partnership in the year 1889 for the practice of their profession under the firm name

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of Stone & Sudduth. The partnership continued for about ten years. The firm was employed by the Richmond & Irvine Construction Company in the case of the Central Trust Company against the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, in the United States Circuit Court for the District of Kentucky. While the suit was undetermined, on November 1, 1895, Sudduth borrowed of appellant, the Columbia Finance & Trust Company, $3,000, for which he executed to it his note, and to secure the note assigned to it in writing enough of his portion of his fee in that case to pay the note. Stone consented in writing to the assignment of one-half the fee to the trust company. On August 3, 1898, Sudduth, to secure his individual pre-existing debt and additional advances, assigned to appellee, the First National Bank, $2,500 of the amount due him out of the firm fees in the case referred to, and on February 20, 1899, he, to secure his individual pre-existing debt and other advances assigned to it the further sum of $5,000 of the amount due him out of the firm fees in that case. These assignments were made without the knowledge or consent of Stone, but on April 8, 1899, notice thereof was given by the bank to the construction company. On April 18, 1899, Stone borrowed of the trust company $4,000, executing his note therefor, and to secure it an assignment of his one-half interest in the fees of Stone & Sudduth above referred to; also his half of their fees in behalf of L. F. Mann in that action; and to this arrangement Sudduth, in writing, consented. Notice was given by the trust company to the construction company on May 8, 1899, of the assignments to it by Sudduth and Stone of the fees referred to. The firm of Stone & Sudduth was dissolved on August 14, 1899. After this, on September 20, 1899, there was paid to the Richmond & Irvine Construc-

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tion Company and its attorneys, Stone & Sudduth, the sum of $32,431.69, which sum included the fees of the attorneys in the action mentioned, and, there being a disagreement between the attorneys and their client as to the amount of their fees, the money was deposited in the First National Bank to the credit of B. H. Young, president, W. A. Sudduth, and H. L. Stone, with the understanding that the fees were embraced in the deposit, and that no part of the money was to be paid out except on checks signed by the three—Young, Stone, and Sudduth—Young being the president of the construction company. After this, on October 9, 1899, Sudduth authorized the bank to appropriate $7,500 of the amount to the satisfaction of the assignments he had made to the bank. Stone knew nothing of it, and Young, who was informed of it by the cashier, said that he had no right to do this; that the money was placed there subject to the order of Stone, Sudduth, and himself. The cashier said that he had made a memorandum check, and had appropriated the money under the assignment with the agreement of Sudduth. Young replied that he could do what he pleased with Sudduth's money, but that he could not take the company's money, and it was then agreed between Young and the cashier that, if the fees of the attorneys were fixed at less than $7,500, the bank would refund to the construction company the amount so overdrawn. While matters thus stood, Sudduth died in November, 1899, and in December the attorneys' fees were fixed at $6,725.86, and thereupon the bank returned to the credit of the fund $774.14, this being the amount of excess appropriated by it over and above the fees. The trust company did not know at that time anything of these proceedings between the bank and Sudduth, nor did Stone. On January 3, 1900, a check was delivered to the trust company on the bank

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for $3,362.93, being Stone's one-half of the fees; also a check for $3,236, to be paid out of Sudduth's portion of the fees. These checks were signed by Young as president, H. L. Stone, and the executor of Sudduth. They were presented to the bank, and, payment being refused, this action was brought to recover on them. After a voluminous preparation of the case, the circuit court entered judgment in favor of the bank, and the trust company appeals.

The grounds of the judgment, as stated by the learned circuit judge, seems to be as follows: (1) The bank has possession and ownership of the money in controversy, having appropriated it by the direction of Sudduth, and with the consent of the construction company; and will not, therefore, be required to give way to the previous assignments made to the trust company, which were not assignments of the entire fund, but only of so much of it as was necessary to pay the notes. (2) It was known that the bank would not pay the checks when they were drawn, and no action can be maintained upon them by the trust company.

It was held in Weinstock v. Bellwood, 75 Ky., 139, that an entire claim can not be severed without the consent of the debtor, and that an action can not be maintained at law by the assignee of a part of a debt against the debtor, unless the assignment had been consented to by him. The general rule on this subject is thus stated in 4 Cyc., p. 27: "Partial assignments of such choses in action as are assignable can be made so as to entitle the assignee to the rights of a co-owner against the assignor. In England, and under some of the decisions of the American courts, an order given by a creditor to his debtor to pay a third party

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so much money out of a specific fund or debt is a valid assignment of so much of the fund or debt. But the weight of authority in the United States seems to be that such assignments, unless made with the consent of the party liable on account of the chose, are not binding upon him, and he may discharge the liability by settlement with the assignor, the same as if no assignment had been made. Courts of equity, however, have always recognized partial assignments of choses in action for many purposes, and will protect the assignees of such choses whenever they can do so without working a hardship upon the debtor." To same effect, see 2 Am. & Eng. Ency. of Law, 1069, 1070; 3 Pomeroy's Equity, section 1280. All the assignments in controversy were partial. After the payment of Sudduth's note to the trust company, there would be left a balance of $136.93 of his part of the fee. And after the payment of Stone's note to it there would also be a balance of his part of the fees, as the Mann fee of $2,970.62, or his part of it, was included in the assignment to secure his note. The first assignment of Sudduth to the bank was of $2,500 out of the amount of their fees, and the second assignment was $5,000 out of the fees, the amount of the fees then claimed by Stone and Sudduth being between $8,000 and $9,000. All the assignments being partial, the assignments to the trust company, having been made before those to the bank, must be adjudged superior to them, unless there is something in the case to take it out of the rule that the older equity must prevail over a junior equity, other things being equal. Millar v. Field, 10 Ky., 108.

The $32,431.69 having been deposited in the bank to the credit of B. H. Young, president, W. A. Sudduth, and H. L. Stone, and to be checked out only on checks signed by the three, Sudduth had no authority, without the consent of

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Stone and Young, to authorize the bank to appropriate any part of the money to the payment of his individual debt to it. The purpose of depositing the money, as it was, to the credit of the three, was to prevent any one of them from appropriating it without the consent of the other two. The form of deposit showed this, outside of the parol agreement. The rule is that, if several persons make a deposit to their joint credit, the bank must have the signatures of all of them appended to the check before paying it, or it takes the risk. 2 Morse on Banking, sections 425-436. The money having been deposited with the bank to the credit of Young, Stone, and Sudduth, and on the agreement that it was not to be paid out except on their joint checks, the bank acquired no title to the money, which it thus held in trust, by applying it to the payment of its debt against Sudduth. The law does not permit one who has acquired possession for one pupose thus to gain an advantage; and the legal status of the bank, after the memorandum check was credited to it on the account by the direction of Sudduth, was not different from what it was before. Besides, so much of the deposit as represented the fee of Stone & Sudduth was the property of the firm, and Sudduth could not use it to pay his debt to the bank without the consent of Stone. The bank was charged with notice that one of the partners had no right to apply the partnership assets to the payment of his individual debt, and when it made the appropriation by the direction of Sudduth alone it acquired no greater rights than he had. Jackson v. Holloway, 53 Ky., 133. A partner in dealing with the firm property is a trustee for the firm. The authorities are uniform that, if a depositor of trust funds appropriates them to the payment of his individual debt to the bank, the latter, having notice of the character of the fund, is affected with knowl-

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edge of the misappropriaton, and will be compelled to refund. 1 Morse on Banking (4th Ed.), section 317. On the other hand, each of the partners having consented to the assignment made by the other to the trust company, these assignments were, in effect, the assignments of the firm, or of as much force as if they had been made in the name of the firm. True, they were partial assignments, but they were afterwards assented to by the construction company, when Young, as president, signed the checks sued on. Besides, the construction company is not complaining. No right of its is affected; and, as we have seen, equity will protect, as far as it can do so without injury to the debtor, rights acquired by partial assignments.

The rights of the trust company are not affected by reason of the fact that the bank first gave notice to the debtor of its assignments. The rule in England is that, as between successive assignees of the same chose, each being a *bona fide* purchaser for value, the one who first gives notice to the debtor will be entitled to preference, although his assignment is later in date. Some courts in this country have adopted the same rule, but the weight of authority in America is to the effect that among successive assignments the order of time controls. 2 Pomeroy's Equity, section 695; 4 Cyc., pp. 32, 77. The rule of caveat emptor applies to sales of choses in action as in other sales of personal property, and, if the seller has sold the thing to one person, and therefore has no title to pass to a second, the latter takes nothing by his purchase. The assignee's right of action is without prejudice to any discount, set-off, or defense the debtor has before notice of the assignment. Kentucky Statutes, 1899, section 474; Civil Code, section 19. The purpose of the notice is to protect the debtor in such defenses innocently acquired. It adds nothing to the as-

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signee's title, which is perfect as between him and the assignor or those claiming under him from the time of the assignment. While the precise question appears not to have been directly passed on heretofore by this court, the principles announced lead to the conclusion indicated. See Millar v. Field, 10 Ky., 108; Newby v. Hill, 59 Ky., 553; Garrott v. Jaffray, 73 Ky., 415; Beard v. Sharp, 23 R., 1582; 65 S. W., 810. Here no right of the construction company was affected by reason of the failure of appellant to give notice of its assignments to the construction company for a month after appellee's notice was given. The situation of the parties when the notice was given was just as it was a month before, and the construction company had then no defense against the assignor. The failure of appellant to give the notice sooner, having prejudiced no right, was immaterial.

It was held in Lester v. Given, 71 Ky., 357, that the holder of an unaccepted check on a bank might maintain an action thereon. This case has frequently been followed since, and we regard the rule as settled. Merchants' National Bank v. Robinson, 97 Ky., 552, 17 R., 368, 31 S. W., 136, 28 L. R. A., 760; Weiand's Adm'r v. State National Bank, 112 Ky., 310, 23 R., 1517, 65 S. W., 617, 66 S. W., 26, and cases cited. The fact that the bank in this case claimed not to have the money on hand when the checks were drawn is not sufficient to take it out of the rule, for the checks completed the transaction, and were the proper means for bringing to a decision the question in dispute.

Sudduth died insolvent. He was also considerably overdrawn with the firm of Stone & Sudduth. Whether there will be anything coming to him on the settlement of the firm or what will be the rights of the bank in this event, can not be determined in this suit, for neither Stone nor

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Sudduth's representative nor his other creditors are before the court.

It is insisted for the bank that the trust company should be required to exhaust the fund arising from the Mann fee before resorting to the bank fund, under the rule that a creditor having a lien on two funds, on one of which another creditor has a junior lien, will be required to exhaust first the fund not incumbered by the junior lien. But that rule has no application, as the bank is not a creditor of Stone's, and as the creditor of Sudduth it can not impose terms on the trust company as the creditor of Stone. What may be the right of the bank to Sudduth's part of the Mann fee can not be determined here, as the necessary parties are not before the court.

Judgment reversed, and cause remanded, with directions to enter a judgment in favor of appellant.

CASE 34—ACTION BY P. P. WYLES, COMMISSIONER, AGAINST BAILEY D. BERRY ON A PROMISSORY NOTE.—OCT. 9.

Wyles (Commissioner) v. Berry.

APPEAL FROM HARRISON CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

PLEADING—WITHDRAWAL OF ANSWER—ADMISSIONS THEREIN AS EVIDENCE—EVIDENCE AS TO FINANCIAL STANDING OF PRINCIPAL IN NOTE.

Held: 1. An order allowing a defendant to withdraw an answer and file another merely eliminates the pleading as a pleading tendering an issue to be tried, and does not authorize him to take it off the files.

2. Where defendant is allowed to withdraw his answer in an action on a bond, pleading that he had signed it as surety only, and to file one pleading *non est factum*, the original answer, if sworn to by defendant, or if authorized and known by him to have been made, may be proved against him as an admission.

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3. In an action against the principal on a bond for money loaned by order of court, plaintiff may show the financial condition, at the time of the loan, of a third person for whom the money was actually borrowed.

LUCIUS DESHA, ATTORNEY FOR APPELLANT.

The appellant as master commissioner of the Harrison Circuit Court, and on the order of said court brought this suit on a note for $1,343.40 against appellee, Berry, and J. I. Blanton, which was executed by said Berry as principal, with Blanton as surety to said commissioner.

Blanton made no defense. Berry filed an answer which he withdrew and then filed another pleading *non est factum*. The answer was in three paragraphs. The second was "no consideration received by him." He claims that Blanton got the proceeds for which the bond was executed. The third was a plea of estoppel, because interest had been paid and because the suit had not been brought sooner; to both of these the court sustained a demurrer, but the plea of *non est factum* was sustained and a verdict rendered for defendant Berry.

In the first paragraph of the answer he admits the allegations of the petition, that the money sued for was part of the proceeds of dower land sold under a judgment of the chancery court in an action pending therein; that said fund was in the custody of the court who made an order directing the commissioner to loan said fund and pay the interest to Mrs. Mary C. Desha. But he denies that the commissioner filed his report that he loaned the money to Berry and took the bond sued on, and denies that the report was approved or confirmed by the court and finally pleads *non est factum*.

We submit that the evidence conclusively shows that the commissioner reported the loan to the court and same was confirmed and that Berry signed the bond sued on as principal and is bound thereby, and Berry in his own evidence admits that the signature looks like his. The only thing that Berry relies on was that Blanton got the money and that he, Berry, did not get it.

We contend that it was error in the court to allow the defendant Berry to withdraw his original answer from the record; that having once been filed, it could not be taken out of the record, and that by reason of the fact that it had been so taken out and the defendant refused to produce it the appellant had the right to prove its contents to show that the defendant therein

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made an admission or a statement differing from what he swears to on the stand.

If we leave out Blanton and add to this admission the fact that the writing sued on is in regular form, and that there is nothing about it to lead to a suspicion that it is not what it purports to be, as will be seen by an inspection of the paper itself, we find the overwhelming preponderance of the evidence is against the truth of the verdict.

J. STANLEY WEBSTER, ATTORNEY FOR APPELLEE.

(No brief in the record for appellee.)

OPINION BY JUDGE O'REAR—REVERSING.

Appellee, sued as principal upon a bond for the payment of money loaned by order of the Harrison circuit court, pleaded *non est factum* to the obligation. Upon the trial the plaintiff offered to prove that appellee had filed an answer originally in the action upon the bond, pleading that he had signed it as surety only, whereas it appears to have been executed by him as principal. He was permitted, without objection, and before reply, to "withdraw" that answer, and to file another denying the execution of the paper. The trial court refused to require appellee to replace the withdrawn pleading with the files of the suit, though he admitted he had it in his possession, and refused, too, to admit evidence as to its contents.

Appellee should have been required to replace the paper among the files of the suit, and, if that could not be done, its contents should have been admitted. Even if a party is permitted, in the discretion of the court, to withdraw a pleading, it does not follow, and, indeed, it is not proper, that he should be permitted to take it off the files of the record without leaving a properly attested copy. The effect of the order permitting the withdrawal is merely to eliminate the pleading as a pleading tendering an issue to be tried in the case. If it contains an admission of fact rele-

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vant to the trial, and if it is signed or sworn to by the party in whose behalf it was filed, such admission may be proved on the trial against the party making it, as may be any other admission of his against his interest. We are aware that in some jurisdictions, and in some instances in this State, pleadings are not required to be verified by the personal oath of the party, nor to be signed by him. In such cases, in the absence of showing that he authorized and knew of the making of the statement asserting a fact purporting to be within his personal knowledge, and afterward sought to be proved as an admission, it should not be allowed. But where he signs the pleading, and especially where he swears to the truth of its statements, we perceive no reason why an admission of fact in it against his interest may not be proved by his adversary, as if made under other circumstances. The weight of authority, as well as sound reason, seem to support this rule. Pope v. Allis, 115 U. S., 363, 6 Sup. Ct., 69, 29 L. Ed., 393; Delaware Co. v. Diebold, etc., 133 U. S., 473, 10 Sup. Ct., 399, 33 L. Ed., 674; Gibson v. Herriott, 55 Ark., 85, 17 S. W., 589, 29 Am. St. Rep., 17; Raridan v. Central Iowa Ry. Co., 69 Iowa, 527, 29 N. W., 599; Baltimore, etc., R. R. Co. v. Evarts, 112 Ind., 533, 14 N. E., 369; Daub v. Englebach, 109 Ill., 267; Peckham Iron Co. v. Harper, 41 Ohio St., 100; Fite v. Black, 92 Ga., 363, 17 S. E., 349; Blankman v. Vallejo, 15 Cal., 639.

The affidavit of J. I. Blanton, offered to contradict or impeach his testimony, was properly rejected, as it was not conflicting with his statements on the trial.

Evidence offered by appellant tending to show the financial worth of J. I. Blanton at the time the money was loaned, who appears to have been the person for whom the money was actually borrowed, should have been permitted.

Judgment reversed. and cause remanded for a new trial, under proceedings not inconsistent herewith.

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CASE 35—ACTION BY SALLIE O. WALKER AGAINST THE FIDELITY TRUST & SAFETY VAULT CO. AS TRUSTEE FOR W. H. STITES AND OTHERS AS GARNISHEE.—OCT. 9.

Fidelity Trust & Safety Vault Co. v. Walker.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

TRUSTS—CONSTRUCTION—RIGHTS OF CESTUI QUE TRUST—LIABILITY OF FUND FOR CESTUI'S DEBTS.

Held: 1. A trust deed conveyed the residue of the trust fund to be invested by the trustee, and the net income paid in equal monthly installments of $50 each, and, in case the income did not amount to such sum, the principal should be liable therefor, to S., to be by him expended for the benefit of his children and family without liability to account therefor, and on his death the principal to pass in fee to his children, with power in S. to appoint same among his children by will, and, if S. should survive his present children, he might elect to demand and receive from the trustee the principal of the fund, provided that at any time after the previous life estate had been terminated, if S. affirmatively showed to the trustee that he was not indebted to any person, the income should be paid to him for his exclusive use and benefit. HELD, that such deed vested in S. the fee in the income and principal of the estate to the extent of $50 per month, which amount was liable for his debts.

THOMAS W. BULLITT AND A. SCOTT BULLITT, FOR APPELLANTS.

This is an appeal from a judgment of the Jefferson Circuit Court, sustaining a general demurrer to the answer of the appellants (defendants below), and subjecting the income and part of the principal of a trust fund in the hands of the Fidelity Trust & Safety Vault Company, trustee (hereinafter called the Fidelity Trust Company), to the payment of a debt due by W. H. Stites to the appellee, Sallie O. Walker (plaintiff below).

W. H. Stites, made a defendant in the petition, was not served with process, and has not appeared in the action.

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STATEMENT OF FACTS.

On December 7. 1892, in the circuit court of Davidson county, Tennessee, appellee, Sallie O. Walker, then the wife of W. H. Stites, obtained a decree of divorce from him, and was restored to her maiden name, Sallie O. Walker. She obtained a judgment for alimony in the sum of $1,944.51, with costs amounting to $14.75. The judgment remains unpaid.

W. H. Stites became, and when suit was brought was, a resident of St. Louis, Mo.

His family consists of three children born of a former wife, viz., the appellants, Thomas T. Stites, John Stites, Jr., and Kittie Stites Figgin. He has not married again.

In the year 1894 one Gervas Lenox Taylor, of Dublin, Ireland, by last will, devised a fund of $75,000 to be held in trust for the use and benefit of Elizabeth Stites, of Christian county, for her life, with remainder to her eight children, of whom the said W. H. Stites was one.

On July 18, 1895, W. H. Stites, by a bill of sale, in consideration of $6,589.13 paid to him, assigned and transferred his undivided one-eighth interest in remainder of the aforesaid fund to his mother, Mrs. Elizabeth Stites.

On August 20, 1895, Mrs. Elizabeth Stites (her husband uniting) executed and delivered to the Fidelity Trust Company a Deed of Trust (Rec. 19-21), whereby she conveyed to it the said undivided one-eighth interest in the remainder in said fund, to hold the same in trust, however, as follows:

"*First.* Out of the principal of said share, when received, said second party shall pay the sum of three hundred ($300) dollars, with interest from July 18, 1895, advanced to said W. H. Stites.

"*Second.* And shall pay to the personal representative of said Elizabeth Stites the sum of twelve hundred and twenty-four and sixty-one one hundredths ($1,224.61) dollars without interest prior to her death.

"*Third.* The residue of said fund shall be invested by said second party as trust funds are invested under the laws of the State of Kentucky, and the net income therefrom paid in equal monthly installments to said W. H. Stites, to be by him expended for the benefit of his children and family without any liability of accounting therefor, and on his death the principal shall pass in fee to his children, the issue of any children who may die leaving children to take their parent's share, with power in said W. H. Stites to appoint same among his children by will. Should he survive all of his present children the said

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W. H. Stites may, if he so elect, demand and receive from the said trust company the principal of said fund, and, in default of his exercising said power, the same shall at his death pass to such persons as he by last will and testament may designate, and if he should leave no will it shall then pass to his heirs at law under the statutes of descent of the State of Kentucky."

"Provided, that at any time after said life estate ends and said second party received said fund, the said W. H. Stites shall affirmatively show to said trustee that he is not indebted to any person in any sum whatever, the said income may be paid to him for his own exclusive use and benefit, if he shall so elect, and provided, further, that if the income from said fund is less than fifty ($50) dollars per month net, to the said second party, if said W. H. Stites shall so elect, shall pay to him in trust or in fee as hereinbefore directed the sum of fifty ($50) dollars per month so long as said trust fund shall last, and charge the amount of such payment over and above the income therefrom to the principal."

Mrs. Elizabeth Stites died on April 14, 1901.

The Fidelity Trust Company, having paid the sum of $300 and $1,224.61, as provided in clauses one and two of the deed, still has in its hands the principal sum of $6,602, being the residue of said undivided one-eighth interest in the trust fund assigned as aforesaid in trust by Elizabeth Stites to the Fidelity Trust Company.

THE PLEADINGS.

On June 17, 1901, the appellee, Sallie O. Walker, filed suit in the Jefferson Circuit Court against W. H. Stites, seeking to recover on the Tennessee judgment the sum of $1,944.51, and costs above mentioned.

An attachment thereupon was issued and served upon the Fidelity Trust Company as garnishee.

The Fidelity Trust Company, as garnishee, filed a response, declaring that it had no money or property in its hands belonging to W. H. Stites, or in which he had an interest.

On October 31, 1901, the appellee filed an amended petition making the Fidelity Trust Company a party defendant as garnishee.

On February 25, 1902, appellee filed a second amended petition making appellants, the children of W. H. Stites, viz., Thomas T. Stites and John Stites, Jr., and Kittie Stites Figgin, defendants.

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The first amended petition above mentioned sets out substantially:

1. That the defendant, Fidelity Trust Company, did not, in its answer as garnishee, make a full, true, or satisfactory disclosure of the money or property in its hands belonging to W. H. Stites.

2. That the defendant, Fidelity Trust Company, under the deed of trust above mentioned, holds the trust fund therein mentioned—the entire deed being set forth *in haec verba*.

3. That W. H. Stites as *cestui que trust* in the said deed has, under the terms thereof, an interest in the income and part of the principal of said fund.

4. That the bill of sale from W. H. Stites to Elizabeth Stites of his one-eighth interest in remainder in the Gervas Lenox Taylor fund above mentioned, was a mere colorable transfer, made with a view to defeat the claims of his creditors, and that the deed of trust was made pursuant to an agreement between said W. H. Stites and Elizabeth Stites entered into at the time of said sale.

5. Prays that defendant, Fidelity Trust Company, be required to pay into court a sum sufficient to satisfy plaintiff's claim, and that the same be applied thereto.

The second amended petition avers that the defendants, Thomas T. Stites, John Stites, Jr., and Kittie Stites Figgin, claim an interest in the trust fund above mentioned; that it is subordinate to the claim of the plaintiff; and prays that they be required to assert their claim or be forever barred.

No process was issued and no warning order taken against the original defendant, W. H. Stites, on either of the amended petitions; nor was a new attachment sued out.

W. H. Stites has not answered or appeared to either the original or amended petitions.

On December 12, 1901, the Fidelity Trust Company filed its answer to the petition as amended.

On February 27, 1902, the defendants, Thos. T. Stites, John Stites, Jr., and Kittie Stites Figgin, filed their answer to the petition as amended.

These answers set forth substantially the same defenses, which are as follows:

1. It is denied that W. H. Stites, by virtue of the terms of the trust deed from Elizabeth Stites, acquired any interest whatever in the income or principal of the trust fund.

2. It is denied that the transfer by W. H. Stites of his one-eighth interest in the trust fund created by the Gervas Lenox Taylor will was colorable or made for the purpose of defeating

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his creditors, or, that the trust deed made by Elizabeth Stites was made pursuant to an agreement between her and W. H. Stites at the time of said transfer by W. H. Stites.

3. To the claim of fraud as to the execution of either of these instruments, a plea of the statute of limitation is interposed.

4. The answer of Thos. T. Stites, John Stites, Jr., and Kittie Stites Figgin claims that they are entitled to have the net income of the trust fund in the hands of the Fidelity Trust Company expended during the life of W. H. Stites for their exclusive benefit and that they are entitled to the principal of the trust fund in fee on the death of said W. H. Stites.

To each of these answers the appellee, Sallie O. Walker, interposed a general demurrer.

Each of said demurrers was sustained.

The appellants thereupon declined to plead further.

Thereupon, on March 22, 1902, the following judgment was rendered.

1. That W. H. Stites is indebted to the appellee in the full amount of the Tennessee judgment, and that the attachment against the trust fund in the hands of the Fidelity Trust Company is sustained.

2. That under the terms of the trust deed from Elizabeth Stites to the Fidelity Trust Company, W. H. Stites is entitled to receive absolutely the sum of $50 per month, to be paid out of the income, if sufficient; if insufficient, then the deficit to be made up out of the principal of the trust fund; and that the appellee has a lien thereon for the satisfaction of her judgment against W. H. Stites.

3. The interests of appellants, Thos. T. Stites, John Stites, Jr., and Kittie Stites Figgin are subordinate to the lien of the appellee, Sallie O. Walker.

4. That the appellant, Fidelity Trust Company, trustee of the trust fund in its hands, pay into court the sum of $50 per month, to be applied to the judgment in favor of appellee until the death of W. H. Stites, or until the appellee's judgment is satisfied.

On May 17, 1902, Fidelity Trust Company, Thos. T. Stites, John Stites, Jr., and Kittie Stites Figgin, after due notice, moved the court to set aside the judgment rendered March 22, 1902, and to be permitted to file a supplemental answer setting forth as follows:

1. That W. H. Stites had resigned as sub-trustee under the deed of trust from Elizabeth Stites above mentioned.

2. That said W. H. Stites had disclaimed any and all interest in the fund.

This motion was overruled.

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The first proposition submitted is that the judgment appealed from is void as to W. H. Stites, and, consequently, erroneous as to other defendants.

The question may be thus stated: Is W. H. Stites, under the terms of the trust deed from Elizabeth Stites to the Fidelity Trust Company, entitled to receive in his own right, to the exclusion of the appellants, his children, the income of the trust fund created by said deed, together with such portion of the principal fund as may aggregate $50 per month?

Or, on the other hand, does W. H. Stites receive said income or said amount of $50 per month as trustee for the use and benefit of appellants, his children?

The following are settled and may be considered as elementary principles of law:

1. A deed is to be construed so as to effectuate the true intention of the parties. That intention is to be gathered from the language of the instrument, all its parts being considered together.

2. If it be possible, each clause and each word in a deed shall be given effect. No part of it shall be rejected.

3. If it be possible, the different parts of the deed shall be so construed as to avoid conflict—to produce harmony between its various provisions.

4. If a deed is capable of two constructions, one indicating a lawful and the other an unlawful intent, it will be construed that the lawful purpose was intended.

CITATION OF AUTHORITIES.

1. Of the true rule of construction in case of conflict between different provisions in a deed of trust or other instrument. 17 Am. & Eng. Ency. of Law, pp. 7, 8; Spurrier v. Parker, 16 B. M., 274; Churchill v. Reamer, 8 Bush, 256.

2. Of the right of the mother by the terms of a trust deed to protect the trust fund against the debts of a son in the interest of that son's children. Pope v. Elliott, 8 B. M., 60; Bull v. Ky. Nat. Bank, 90 Ky., 453; White v. Thomas, 8 Bush, 661.

3. Of the construction of the words "the net income therefrom (to be) paid in equal monthly installments to said W. H. Stites, to be by him expended for the benefit of his children and family without any liability of accounting therefor." Hamley v. Gilbert (4 Eng. Chan.), 1 Jacob, 354; In re Ashley, 1 Russ & Mylne, 371; Biddle's Appeal, 80 Pa. Stat., 258; Bohon v. Barrett, 79 Ky., 378; Marshall v. Rash, 87 Ky., 116; Jones v. Clifton, 101 U. S., 225.

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4. Authorities cited in opinion of the court below, reviewed and considered. Ky. Stats., sec. 2355; Samuel v. Salter, 3 Met., 259; Knefler v. Shreve, 78 Ky., 297; Woolley v. Preston, 82 Ky., 415; Parsons v. Spencer, 83 Ky., 305; Bland v. Bland, 90 Ky., 400; Garner v. Wills, 92 Ky., 386; Webster v. Wathen, 97 Ky., 318.

SIMRALL & DOOLAN, ATTORNEYS FOR APPELLEE.

POINTS AND AUTHORITIES.

1. The judgment appealed from is more favorable to the appellants than they were entitled to claim. The entire trust fund, and not merely an allowance therefrom of fifty dollars per month, should have been subjected to appellee's claim.

2. Viewed in the light of surrounding circumstances, the deed of trust involved in this case was evidently intended to vest in W. H. Stites, a beneficial interest to the extent of not less than fifty dollars per month, it appearing that the entire fund was his, and that the transfers made still give him the most ample dominion over the fund, while attempting to protect it from liability for his debts. This can not be done under our law. Ky. Stats., secs. 2355; Smith v. Smith, 24 Ky. Law Rep., 2261; Bland v Bland, 90 Ky., 400; Marshall v. Rash, 87 Ky., 116; Parsons v. Spencer, 83 Ky., 305; Bull v. Ky. Nat. Bank, 90 Ky., 454; Woolley v. Preston, 82 Ky., 415; Samuel v. Salter, 3 Met., 259; Waite on Fraudulent Conveyances, 3d ed., secs. 360, 364, 365, 366 and 376.

3. The language of the deed of trust does not make W. H. Stites a sub-trustee for his children. Garner v. Wills, 92 Ky., 386; Webster v. Wathen, 97 Ky., 318; Dravo v. Seebolt, 17 Ky. Law Rep., 1165; Sale v. Thornberry, 86 Ky., 266; Enders, Extr., v. Tasco, 89 Ky., 17; Pope's Extr. v. Elliott, 8 B. Mon., 66; Speirs v. Roberts, 73 Mich., 666; Taft v. Taft, 130 Mass., 461; Paisley's App., 70 Pa. St., 153; Biddle's App., 80 Pa. St., 258; Byne v. Blackburn, 26 Beavan, 414.

4. As the head of his own family, and consequently as a member of it, W. H. Stites must be regarded as himself a beneficiary of any *supposed* sub-trust, and the courts could not control him in the expenditure of his entire allowance for his own benefit. Certainly this could not be done in the face of an express provision that he should not be held accountable for his expenditure of the fund. (See authorities cited above.)

5. The language of the deed of trust does not give to the appellants any rights which they could enforce against W. H. Stites, or which could be treated as an estate or interest and subjected to the payment of their debts at the suit of any of

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their creditors. Davidson v. Kemper, 79 Ky., 5; Garner v. Wills, 92 Ky., 286; Webster v. Wathen, 97 Ky., 318, 324; Pope's Extr. v. Elliott, 8 B. Mon., 66.

6. As the income or allowance of this trust fund does not belong to any one of these appellants in the sense that any part of it could be subjected to the payment of his or her debts, it must belong to W. H. Stites, and if so, it is subject to the payment of his debts.

7. The appellants in this case are not dependent upon W. H. Stites for maintenance or support. It is not a hardship upon them to subject his own estate to the payment of his own debts. The only hardship involved in this case is that which the appellee has suffered at the hands of W. H. Stites for more than ten years.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

W. H. Stites was entitled to one-eighth in remainder of a sum of about $75,000 bequeathed by one Gervas Lenox Taylor, of Dublin, Ireland. Mrs. Elizabeth Stites, mother of W. H. Stites, was the life tenant. On July 18, 1895, W H. Stites, by a bill of sale, conveyed this interest to his mother, in consideration, it is alleged (and, for the purpose of this appeal, accepted), of $6,589.13 paid to him. On August 20, 1895, Mrs. Elizabeth Stites, for what real consideration is not shown, executed to appellant trust company a deed of trust conveying to it the said undivided one-eighth interest in remainder in said fund, to hold the same in trust as follows:

"First. Out of the principal of said share, when received, said second party shall pay the sum of three hundred ($300) dollars, with interest from July 18th, 1895, advanced to said W. H. Stites.

"Second. And shall pay to the personal representative of said Elizabeth Stites the sum of twelve hundred and twenty-four and sixty-one hundredths ($1,224.61) dollars without interest prior to her death.

"Third. The residue of said fund shall be invested by

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said second party as trust funds are invested under the laws of the State of Kentucky, and the net income therefrom paid in equal monthly installments to said W. H. Stites, to be by him expended for the benefit of his children and family without any liability of accounting therefor, and on his death the principal shall pass in fee to his children, the issue of any children who may die leaving children to take their parent's share, with power in said W. H. Stites to appoint same among his children by will. Should he survive all of his present children, the said W. H. Stites may, if he so elect, demand and receive from the said trust company the principal of said fund, and, in default of his exercising said power, the same shall at his death pass to such persons as he by last will and testament may designate, and if he should leave no will, it shall then pass to his heirs at law under the statutes of descent of the State of Kentucky.

"Provided, that at any time after said life estate ends and said second party receives said fund, said W. H. Stites shall affirmatively show to said trustee that he is not indebted to any person in any sum whatever, the said income may be paid to him for his own exclusive use and benefit, if he shall so elect, and provided further, that if the income from said funds is less than fifty ($50) dollars per month net, the said second party, if said W. H. Stites shall so elect, shall pay to him in trust or in fee as hereinbefore directed the sum of fifty ($50) dollars per month so long as said trust fund shall last, and charge the amount of such payment over and above the income to the principal."

Prior to the transfer by W. H. Stites to his mother on July 18, 1895, he was bound to appellee in the sum of about $1,700, evidenced by a judgment of a court of general juris-

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diction of the State of Tennessee. After the death of Mrs. Elizabeth Stites, and the payment by appellant trust company of the sum reserved in the deed to be then paid to her estate, appellee brought this suit against the judgment debtor, and caused an attachment to be served on appellant trust company as garnishee, attaching the interest of W. H. Stites in the fund mentioned in and set apart by the deed of August 20, 1895. The garnishee answered that it owed the principal defendant nothing, and had not the possession of any property of his. Appellee then, by amended petition, as allowed by section 227, Civ. Code, not being satisfied with the garnishee's answer, set up the execution of the deed and the antecedent transfer, and alleged that they were colorable, fraudulent and designed by W. H. Stites to cheat, hinder and delay his creditors. An issue of fact was tendered by the pleadings of the trustee as to the *bona fides* of the transaction. W. H. Stites' children living when the deed was made, being his only children, were made parties to the suit, and made the same defenses as had been made by the trustee. They were all more than 21 years of age, and one of them, a daughter, was married. The case was tried out on the pleadings alone, the circuit court holding that the provisions of the deed nullified the trust as to all save W. H. Stites, and, as to his interest, subjected it, to the extent of $50 per month, to the payment of appellee's judgment debt and the costs. Thereafter W. H. Stites (who was proceeded against as an absent nonresident) appeared in the county court of Jefferson county, tendered his resignation as trustee of his children under the deed, and nominated one of his sons, who was appointed by that tribunal in his stead. At the same time W. H. Stites renounced the trust in his behalf. Therefore the question for decision is not whether the recited consideration of the

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bill of sale from W. H. Stites to his mother actually passed, nor whether the intention of W. H. Stites in those transactions was or not *mala fides;* for, in the absence of proof, and by reason of the decision having been upon demurrer to appellant's pleadings, those facts, being well pleaded, are to be considered as established in appellant's favor.

What interest did W. H. Stites take under the terms of the trust deed from Elizabeth Stites to the trust company? What are the legal rights of appellants, W. H. Stites' children, under that deed? The answers to these questions decide this case.

In the first place, it is to be observed that the total net income from the principal is to be paid over to W. H. Stites by the trustee. He can expend it upon himself and the other members of his family, including his children, in such manner as he pleases. No one—not the children, nor the trustee, nor any one else—is permitted, by the express prohibition of the deed, to call him to account for the manner in which he uses or disposes of this income. If the income is not $50 per month (and it is not, and will not probably be), then he is likewise empowered to consume the principal so as to produce to him an income of at least $50 per month from this fund. In the next place, W. H. Stites may by will dispose of the principal after his death, being restricted only to his own children and offspring, but being permitted to discriminate among them. Should he survive all his present children, he may then demand and receive as his own the principal, or he can dispose of it absolutely by will, or, if he dies intestate without having consumed it, it goes to his heirs at law. The only point of distinction between the estate thus created in the fund, and the absolute estate therein, is that, if any of W. H. Stites' children survive him, they would take the unexpended principal, sub-

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ject to his power of appointment; that is, his right to discriminate among them, giving to one all or any part of the fund, as he might determine. The contingency must be extremely rare in which a father would wish to exclude all his children from any part of his estate. Nor can the suggestion in the deed that W. H. Stites is to use the income for his children and family, without any liability of accounting therefor, change the nature of the title in the income from an absolute one. It vests him with an unrestrained discretion, by which he may take to himself, as a member of his family, all of the income, or he might apportion its use among those of his family dependent upon him, and whom he is already morally and legally bound to support. That is about what people generally do with their own, anyhow. Under no construction could W. H. Stites' children claim more of the income than his "family." In truth, the deed does not give the income to the "children and family of W. H. Stites to be expended by him." It gives it to W. H. Stites. The expressed purpose for which it was to be expended was more in the nature of a request upon W. H. Stites as to the manner of its use. If it had given the whole fund absolutely to W. H. Stites at his mother's death, to be applied by him for the maintenance of his family, could his children, and other members of his family, have excluded him from a personal use of it, or could they have required, by a chancery proceeding, that he apportion it equitably among them then, or annually so long as they lived? The language used rather signifies a reason for the gift, than implies an irrevocable dedication of the income to the use of particular persons. Especially is this so when any meaning and effect is given to the expression "without liability to account therefor." That W. H. Stites could exclude his children from any sort of claim upon the

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income by merely showing he was free of debts, makes the interest of his children more equivocal, if possible, while affording a not unreasonable test of the main purpose of the instrument.

In the very excellent brief of able counsel, appellants properly insist that every part of the instrument, and all of its provisions equally, if possible, be considered in arriving at the intent of the settlor, which must control so far as it is not repugnant to the law. Applying this rule, one can not escape the conclusion that the person whose interest was studiously sought to be conserved in every line and provision of the trust was that of W. H. Stites. With the fullest possible right of personal enjoyment, with privilege of disposing of any surplus at his death in the manner most natural and most likely to be desirable, little more could have been added to the completeness of his title. The interest of his children, if it can be said that they had any but a contingent one, was made to depend upon the natural instinct of their father to aid them as he might judge to be proper, having regard to his conception of his own interests and the natural claims of other members of his family. This, at last, is precisely the "interest" that all children naturally have in their parents' property during the lifetime of the latter. It can not be said then that the children took a legal estate in the income of this fund. If this were a proceeding by a creditor of W. H. Stites' children to subject their interest in the fund, what part of it could the chancellor lay hold on, and say it was liable? In Pope's Ex'rs v. Elliott, 8 B. Mon., 56, it was held that where the executors were not compelled to pay a sum of $25 per month to the support of a devisee, but were authorized to do so in their discretion, the interest of the devisee could not be subjected. In Cosby v. Ferguson, 3 J. J. Marsh., 264, a sum

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had been set apart in trust for the benefit of Cosby and his family, "the interest to be appropriated to the maintenance and use of himself and family during their lives." Cosby's interest was subjected to the payment of his debts. The court declined to pass on the question of what beneficial interest the children took. In Garner v. Wills, 92 Ky., 386, 13 R.,786, 17 S. W., 1023, the devise was to the testatrix's children, with this provision for the support of her husband: "I desire that my children give to my husband each year a sum sufficient to support him in a comfortable manner, and furnish to him a comfortable home and maintenance until his death." It was also provided that, if the children failed to furnish the testratrix's husband the home and support, the devise to them was to become void. It was held that the husband took no interest that could be subjected to his debts. In Webster v. Wathen, 97 Ky., 318, 17 R., 33, 30 S. W., 663, the testratrix gave her estate to Hettie Cunningham Wathen. This provision was made as to a sister, Euphemia: "I want her [Hettie] to give any presents to my sister, Euphemia Cunningham Webster, that she may need, and that my estate can afford. I want Hettie, as far as possible, to look after my sister Euphemia's interest, and to protect her as far as lies in her power." It was held that the will did not create a trust in behalf of Euphemia. In that case the court approved these cardinal tests of a trust created by will or deed: (1) The words of the testator must be mandatory; (2) the person intended to be benefited must be certain; (3) the subject to which the obligation relates must be certain. In Davidson's Ex'rs v. Kemper, 79 Ky., 5, the court reviews the cases bearing on this subject, and thus stated the rule: "It will be observed that where, in the cases cited, the interest of the beneficiary has been subjected, there was an absolute ap-

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propriation of a certain sum for the benefit of the *cestui que trust,* to be applied in some instances under the direction of the trustee, but in no case, as here, has it been left discretionary with the trustee as to whether the *cestui que trust* should have the use or benefit of any of the property held in trust." All of these cases are necessarily founded upon the idea that these persons did not take an enforceable beneficial interest in the estate sought to be subjected. The trial court went upon the theory that this was a "spendthrift trust," where the most complete enjoyment and most ample dominion over an estate is given to one, with an attempt on the part of the donor to exempt it from liability for the debts of the beneficiary. As these creatures tend to beget idleness and irresponsibility and to shelter fraud, the policy of the law has been to discountenance them. As said by Waite on Fraudulent Conveyances, section 360: "It is opposed to a wise public policy that a man should have an estate to live on, but not an estate to pay his debts with, or that he should possess the benefits of wealth without the responsibilities." This policy has been signified in this State by statute since 1797. Section 2355, Kentucky Statutes, 1899, provides: "Estates of every kind held or possessed in trust, shall be subject to the debts and charges of the persons to whose use, or for whose benefit, they shall be respectively held or possessed, as they would be subject if those persons owned the like interest in the property held or possessed as they own or shall own in the use or trust thereof."

We hold that W. H. Stites took the beneficial interest in the principal funds in the hands of the trust company as trustee, to the extent at least of the right to receive $50 per month therefrom in any event. It was therefore not improper to have subjected that interest so far as was neces-

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sary to the payment of appellee's judgment debt. These conclusions, we think, are supported by the following additional cases: Dravo v. Seebolt, 17 R., 1165, 33 S. W., 1106; Sale v. Thornberry, 86 Ky., 266, 9 R., 472, 5 S. W., 468; Enders' Ex'r v. Tasco, 89 Ky., 17, 11 R., 592, 11 S. W., 818; Bland's Adm'r v. Bland, 90 Ky., 400, 12 R., 532, 14 S. W., 423, 9 L. R. A., 599, 29 Am. St. Rep., 390; Parsons v. Spencer, 83 Ky., 305, 7 R., 329.

Judgment affirmed.

Petition for rehearing by appellant overruled.

CASE 36—ACTION BY COMMONWEALTH AGAINST W. B. ROARK AND OTHERS AS SURETIES ON A BAIL BOND.—OCT. 9.

Commonwealth v. Roark, &c.

APPEAL FROM ALLEN CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND COMMONWEALTH APPEALS. REVERSED.

BAIL BOND—DISCHARGE OF SURETY—RELEASE OF CO-SURETY—WAIVER OF DEFECTS.

Held: 1. Where a surety acting under a power of attorney from his co-sureties executes a bail bond knowing that a co-surety had not properly executed the power, and that the official taking the bond had no knowledge of the defective power, the other sureties can not claim release from liability because such co-surety was not bound; since the bond having been executed by their representative with knowledge of the defective power, they waived any informality in the execution by the co-surety.

N. A. PORTER, FOR APPELLANT.

In presenting a power of attorney signed by three and falsely purporting to have been signed by the fourth, "M. G. Brown," W. B. Roark practiced a fraud upon the court and he can not escape liability by his own fraud.

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W. B. Roark's knowledge of the fraud at the time of the execution of the bond is imputed to those who have authorized him to act as their agent and none of them can escape.

To such as gave the unconditional power of attorney prior to the signature "M. G. Brown," the unauthorized name subsequently added was a mere nullity, neither conferring authority nor taking any already existing away.

Those subsequently signing to "M. G. Brown," guaranteed the genuineness of M. G. Brown's signature. Wheeler v. Traders' Deposit Bank, 21 Ky. Law Rep., 1416.

W. B. Roark claiming to act under a power of attorney, guarantees the genuineness of the signature thereto.

This case distinguished from Commonwealth v. Belt, 21 Ky. Law Rep., 339.

This case is on all fours with Wheeler v. Traders' Bank, 21 Ky. Law Rep., 1416.

It does not lie in any principal's mouth to claim a release by the fraud of his duly constituted agent, and all who authorized W. B. Roark to act as their agent in the execution of the bond guaranteed the good faith of their agent and the genuineness of every signature.

W. B. GAINES, FOR APPELLANT.

There are three reasons why the court should hold these sureties that did sign the bond:

1. There being no condition in the power of attorney that Brown should sign the bond, certainly as to such of those sureties as signed before the name "M. G. Brown" was signed, as to them the name of M. G. Brown, having been signed by W. B. Roark without authority was merely superfluous and of no binding authority on him, nor could its purporting to have been signed by M. G. Brown thereafter have had the effect to withdraw from W. B. Roark the unconditional authority given him previously. To such as signed after the name "M. G. Brown," the signing of the bond by them was a guaranty that those names appearing before theirs were genuine signatures, so that under any conditions no party to the power of attorney could plead any infirmity because of the name "M. G. Brown."

2. This court has steadily refused to recognize any difference between the sureties to a bail bond and to any other obligation and the distinction between the case at bar and the Belt case, supra, was clearly drawn in Wheeler v. Traders' Deposit Bank, 21 Ky. Law Rep., 1416, and there the case was presented where the name above the appellant's was a forgery. This court said: "Wheeler signed the note as surety, and in doing so guaranteed

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to the bank that every preceding signature was genuine." In this case the name of "M. G. Brown" was a forgery in the sense that it was a false representation of fact, and in fact was a fraud, though, perhaps, not so intended by the boy who signed it. It was a forgery, but not punishable. The two cases cited recognize that principle of commercial law that while there is a warranty of soundness, if the horse has only three legs and the buyer sees it, the warranty that he had four is unavailing. So far as W. B. Roark is concerned there can be no doubt if this case is followed he must be held.

3. While the law is being conceded against our contention, it must also be admitted in our favor, and it is as old as the eternal hills that the knowledge of the agent is the knowledge of the principal. It must be conceded that W. B. Roark was the agent of the sureties in the execution of this bond. It must be conceded that he knew that M. G. Brown did not sign the power of attorney. It inevitably follows, therefore, that at the time and before the execution of the bond these sureties knew that "M. G. Brown" did not sign the power of attorney. It must be conceded that the county judge did not know that M. G. Brown had not signed in person. It must be conceded that the defect in the instrument did not appear upon its face and was a latent defect and such as the warranty of genuineness therefore covered. As a matter of fact when W. B. Roark presented that power of attorney to the county judge with "M. G. Brown" signed in writing thereto it was in law, in fact and in good morals a representation that the words "M. G. Brown" was the true and genuine signature of M. G. Brown.

AUTHORITIES CITED.

Terry & Bell v. Hazlewood, 1 Duvall, 104; Jones v. Shelbyville, &c., Co., 1 Met., 58; Hall v. Smith, 14 Bush, 604; Com. v. Magoffin, 15 R., 775; Wilson v. Louisville, 16 R., 340; Com. v. Yarbro, 84 Ky., 496.

W. C. GOAD, ATTORNEY FOR APPELLEE.

This is an appeal by the Commonwealth against W. B. Roark, &c., from a judgment of the Allen Circuit Court, sustaining a response of sureties in the bail bond of one John Roark, on which a forfeiture was taken, and which bond was taken by the examining court by what purported to be a power of attorney.

The power of attorney contained the name of one Brown, whose name was signed and accepted by the examining court as surety on said bond, and the response by him alleged that he was engaged at work at his mill when approached to become

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surety on said bond, and agreeing to sign same, with Roark's father et als., told his son, who was standing by, to sign his name to the power of attorney, which the son did in pursuance to said verbal authority, and a forfeiture having been taken on said bond, so signed, Brown responded, claiming as defense that he was not bound on the bond, as he did not give the son nor any one written authority to sign his name to the power of attorney or the bond. The court having heard the proof, which amply sustained this contention, rendered judgment exonerating the sureties, and from that judgment this appeal is prosecuted.

It has been so often held by this court that a surety is not bound upon his undertaking unless he either signs the instrument or the authority to an attorney in fact, that I do not deem it necessary to cite any special case. This signing, or this authority, as I understand the law, can not be delegated to another, except in writing, and as the record shows conclusively that the authority in this case was never given to any one by Brown, surety, in writing, I respectfully ask that the judgment in this case of the court below, be affirmed.

OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

John Roark, being in custody before the county judge of Allen county charged with a felony, was admitted to bail by that magistrate for his appearance before the Allen circuit court to answer any indictment that might be found against him growing out of the charge. Appellee, W. B. Roark and others undertook as his bail, in a bond executed before the county judge, that he would so appear; but he defaulted. In a suit upon the forfeited bail bond, one of the sureties, M. G. Brown was discharged, because it was conclusively shown that he did not in person sign the bond, or by a writing signed by him authorize another to sign his name to it. Section 482, Kentucky Statutes, 1899; Billington v. Com., 79 Ky., 400, 3 R. 19. The other answering sureties, appellees W. B. Roark and J. M. Braswell, claim that they were released because Brown was not bound. The circuit court discharged them. The facts are, so far as necessary to understand the point to be decided, that

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W. B. Roark was by a written power of attorney, apparently signed by all the other sureties, and in fact so signed except by Brown, authorized as such attorney in fact to sign the names of the sureties to the bail bond. W. B. Roark was present when M. G. Brown agreed to sign the bond as a surety. But instead of signing his name to the paper (the power of attorney), he requested his son, who was present, to sign it for him, which was done. This was known to W. B. Roark. None of the sureties except W. B. Roark appear to have been present when the bond was executed before the county judge. It was not shown that the county judge knew that M. G. Brown had not in person signed his name to the power of attorney. Now, can it be that W. B. Roark and the other sureties, whom he was representing as their agent in that matter, are released from liability because Brown was not bound? There is a line of cases decided by this court, notably Com. v. Magoffin, 15 R., 775, 25 S. W., 599; Wilson, Rec'r, v. Linville, 96 Ky., 50, 14 R., 150, 16 R., 340, 27 S. W. 857; Com. v. Yarbrough, 84 Ky., 496, 8 R., 483, 2 S. W., 68; and Com. v. Belt, 21 R., 339, 51 S. W., 431—which go to the extent that where the county judge or other official representing the Commonwealth, knowingly permits an incomplete bond to be accepted, as where some of the sureties' names were signed by others without written authority from such obligors, none of the sureties will be bound. And this, too, notwithstanding that all the sureties were present, and saw the bond executed as it was, and notwithstanding that in law it is competent for a surety to waive the execution of the bond by one who had been named therein as his co-surety. In all of those cases the officer representing the Commonwealth knew that some of the sureties named in the bond had not signed it, or knew that some whose names were signed by

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others had not written authority to do so; at least knew that no such authority was exhibited or filed. Nothing appears in those cases to show that the sureties signing intended to waive the due execution of the bond by the others named in it, or that they were aware that the official had not fully complied with the law in requiring the due execution of the bond. From those facts the court argued that the other sureties had a right to presume that the official taking the bond had proper assurance that those signing it for others had legal authority to do so, so as to bind them. None of these cases hold, of course, that any one can presume anything to the contrary of his own actual knowledge. But this case goes beyond anything in any of those cited. The sureties here, excepting Brown, had by a valid paper appointed another to act in their stead and for them in this transaction. Under familiar and salutary principles of the law of agency, when one elects to act by an agent, the knowledge of the latter, acquired or in mind, in that transaction, is conclusively imputed to such principal. Otherwise, it would be safer to the principal to always act by agent, for the agent's guilty knowledge—perhaps the scienter of an action based on the contract made by him—would not affect the principal, though he might profit by the agent's act. Trimble v. Ward, 97 Ky., 748, 17 R., 508, 31 S. W., 864. This matter is well stated by Lord Brougham in Kennedy v. Green, 3 Myl. & K., 699, who says that the reason of this rule is that the "policy and safety of the public forbid a person to deny knowledge while he is so dealing as to keep himself ignorant, . . . and yet all the while let his agent know, and himself perhaps profit by that knowledge." W. B. Roark knew exactly how the power of attorney was executed by Brown; the county judge did not know. W. B. Roark appears to have con-

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ceaked from the county judge the truth as to how the paper was executed, or, what amounts to the same thing, had presented it as genuine when he knew it was not. His act, being for himself and his co-sureties, was equivalent to a representation by each of them that the paper was the genuine signature of Brown, or, at least, they were willing to waive his executing the bond otherwise. They could have waived Brown's signature altogether. They can estop themselves, too, from denying that his signature to the power of attorney was genuine. When one surety says to the official taking the bond, "I know all the facts relating to the signing of the power of attorney by my proposed co-surety. I assure you that he has signed the power of attorney, and request you to accept the bond under that signature of his and of my own, made with full knowledge of the circumstances, and thereupon to release the prisoner," such surety has waived any informality in the execution of the bond by his co-surety. It is also, if acted upon, a good estoppel against his afterward denying the validity of his co-surety's signature. The action of W. B. Roark was tantamount to such assurance.

The judgment is reversed, and cause remanded for a new trial, under proceedings consistent herewith.

Chief Justice Burnam dissents. Judge Paynter not sitting.

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CASE 87—ACTION BY AUGUST WURTH AGAINST THE CITY OF PADUCAH TO RECOVER ON FIVE CITY BONDS AND COUPONS ATTACHED.—OCT. 9.

Wurth v. City of Paducah.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

LIMITATION—CITY BONDS—RUNNING OF STATUTE—REMOVAL OF BAR—TRUST FUND.

Held: 1. The statute of limitations begins to run against an instrument payable at maturity at a certain time and place on presentation, though there is no presentation.

2. The reply in an action, on the original promise to pay bonds, commenced seventeen years after their maturity, alleging that the debtor at all times since issuance of the bonds recognized them as its indebtedness, and within the last fifteen years promised to pay them, is ineffectual to take the case out of the bar of the statute, it not alleging that the promise to pay was made before the bar, and within the statutory period, while the debtor was legally bound to pay the bonds.

3. The mayor and council of a city can not, without legislative authority, extend its liability for its indebtedness, beyond the express terms of its bonds, so as to remove the bar of the statute.

4. The levying and collection of a tax by a city to pay its bonds does not extend the time for suit on the bonds.

5. The levying and collection of a tax by a city to pay its bonds does not make the taxes a trust fund for payment of the bonds, suit on which is barred by limitations.

SAM HOUSTON, FOR APPELLANT.

This suit was brought on five bonds of the city of Paducah with coupons attached, dated November 13, 1868, and due at any time after January 1, 1873.

The suit was filed April 11, 1900.

The defendant in its answer pleads (first) *forgery* and (second) *limitation.*

1. The reply denies forgery and denies limitation and all the affirmative allegations of the answer.

2. The second paragraph of the reply alleges that the bonds and coupons are commercial paper transferable by delivery and

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negotiable and payable to bearer on demand, presentation, and delivery of said bonds and coupons, at the National Bank of New York in the city of New York; that said bonds stipulate on their face that they did not become due and payable until demand, presentation and delivery at said bank; that no cause of action accrued or existed until such presentation and demand; and that on March 13, 1900, appellant did present and deliver said bonds and coupons at and demand their payment at said bank which was refused by the bank, and by appellee; and that they had never before that time been presented for and payment demanded of and at said bank.

Also that all of said bonds and coupons were presented for and payment demanded of appellee at its treasury in the city of Paducah in March, 1900, which was refused.

3. The third paragraph alleges the recognition of these bonds and coupons by the appellee, its admission of its indebtedness by them and its agreement and promise to pay them.

4. The plaintiff tendered and offered to file an amended petition alleging that appellee acknowledged and agreed to pay said bonds within five years before this suit was brought, and levied and collected taxes, as required by its ordinance authorizing the issue of said bonds, to meet and pay the same; and holds said money; that said money is a trust fund; and appellee having said fund and recognizing said indebtedness, is estopped now to refuse to apply same to the payment of said bonds.

The court overruled appellant's motion to file said amended petition and sustained a demurrer to the second and third paragraphs of the reply.

Appellant insists that the rulings of the court against him were purely technical and erroneous, and that the court erred in dismissing his petition.

AUTHORITIES REFERRED TO.

Civil Code of Practice, secs. 112 and 141; sec. 98, subsecs. 1 and 2; sec. 312, subsecs. 1 and 2; sec. 113, subsec. 4; Town of Eminence v. Grasser's Exrs., 82 Ky., 52; Banks v. Coyle, 2 Mar., 564; Roberts v. Roberts, 7 Bush, 100; Filbin's Admr. v. Chesapeake, &c., Railway Co., 91 Ky., 446; Adams Oil Co. v. Christmas & Hughes, 101 Ky., 566; Town of Latonia v. Hopkins, &c., 104 Ky., 421; Rooney v. Tierney, 82 Ky., 253; Muldraugh's Hill, Campbellsville & Columbia Turnpike Co. v. Maupin, 79 Ky., 102.

J. M. WORTEN, FOR APPELLEE.

We do not regard it necessary to undertake to brief this case at any length.

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The attorney for appellant, in his brief, has very fairly stated the case, and there is no issue between us, except as to his conclusions.

It seems to us there is but one question to settle, and but one way to settle that question, to-wit, the question of limitation.

The bonds involved in this action, as shown on the face of the same, could have been sued on by the legal owners and holders of the same, at any time after the first day of January, 1873, more than twenty (20) years ago, and more than seventeen (17) years before the suit on same was instituted.

It is true, as contended for appellant, by his attorney in the brief, that the statute of limitation does not begin to run until the accrual of the cause of action, but certainly it can not be contended that the mere failure of the holder of these bonds to make presentation and demand, when it was in his power so to do, would avoid the running of limitation against an action on the bond, or would stop limitation after it had commenced to run. A cause of action certainly accrues whenever an action may be maintained on behalf of any one, and in this case it can not be denied that the owner and holder of these bonds, on the first day of January, 1873, could have maintained an action, and if that be true, limitation then began to run, and the fifteen (15) years' statute of limitation, the very longest applicable to any kind of paper contracts, barred this action more than two years before it was instituted. We rely on the statute of limitation above referred to, section 2505 of the Kentucky Statutes.

There are other questions involved in the action, but which we do not deem necessary to take up, from the fact, that the settlement of this one will effectually put an end to the litigation. Daniel on Negotiable In., p. 224, vol. 2; White v. Curd, 86 Ky., 191.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—AFFIRMING.

The appellant, August Wurth, brought this suit against the city of Paducah to recover on five bonds of the city, and the coupons attached thereto, which he alleged were issued on the 13th day of November, 1868. The following is a specimen of each of the bonds, with the difference that they do not mature on the same day, but each of them had matured more than seventeen years before the institution of this suit:

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Bond No. 16.

"No. 16. The United States of America.

"$1,000.00. State of Kentucky. $1,000.00.

"New Orleans and Ohio Railroad Company.

"Bond of the City of Paducah.

"The City of Paducah, State of Kentucky, acknowledges itself indebted to the New Orleans and Ohio Railroad Company in the sum of one thousand dollars, for value received, negotiable and payable to bearer, at the National Bank of the State of New York, in the City of New York, for which sum of one thousand dollars, the said City of Paducah, in pursuance of law, issues this Bond, signed by the Mayor and Clerk of the said City of Paducah, and does hereby promise and agree to pay the said sum of one thousand dollars on the first day of January, 1871, upon the presentation and delivery of this bond at the above-named place of payment; also the said City of Paducah promises and agrees to pay interest on said sum of one thousand dollars, at the rate of 6 per cent. per annum, payable at said bank on the 1st day of January and July in each and every year ensuing the date hereof, until the principal debt is paid, upon the delivery of the coupons hereunto attached, signed by the Clerk of said City. This Bond is one of a series of thirty-eight, of like date and amount, and issued by said City of Paducah to said New Orleans and Ohio Railroad Company, in payment of a bond of like amount issued by the City of Paducah, and due and payable.

"[Seal.] Witness the seal of the City of Paducah, and the signatures of the Mayor and Clerk of said City, this thirteenth day of November, one thousand eight hundred and sixty-eight.

"J. W. Sauner, Mayor of Paducah.

"W. M. Greenwood, Clerk of Paducah."

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The city answered, denying liability for various reasons, and pleaded the lapse of time and statute of limitation in bar of recovery. To which appellant replied, denying all the affirmative allegations in the answer relied on to escape liability, and in the second paragraph of his reply alleged that the bonds and coupons sued on were commercial paper, and stipulate that they do not become due and payable until demand, presentation, and delivery thereof at the National Bank of the State of New York, in the city of New York, and that no cause of action accrued thereon until these conditions were complied with; that on the 13th of March, 1900, demand was made for the first time at the bank for payment, which was refused; that within fifteen years before the institution of this suit the defendant, the city of Paducah, by its mayor and council, had admitted and acknowledged the liability of the city for the bonds and coupons sued on, and had agreed and promised to pay same. The city of Paducah interposed a general demurrer to each paragraph of the reply, which was sustained. Plaintiff thereupon offered to file an amended reply, in which he alleged that the city of Paducah had levied and collected a tax sufficient to pay the bonds and coupons sued on, and held the money in trust for their payment, and that it had no right or power to appropriate the money so collected to any other purpose. The trial court refused to permit this amended reply to be filed, and dismissed the petition, and plaintiff has appealed.

It seems to us that neither of the defenses relied on is sufficient to stop the running of the statute. We will consider them separately. The contention that no "cause of action" accrued upon the bonds until after presentation and demand for payment at the bank in the city of New York is the first one. The bonds provide, in terms, that

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they will be paid on a specified day upon their presentation and delivery at the place of payment named in the face of the bond. It is a well-settled rule of law that, if an instrument be payable on demand at a specified time and place, the statute begins to run at its maturity, as payment could be immediately demanded, and, if refused, suit brought. But if payable at a certain time after demand or after notice, actual demand must be made, or notice given, in order to fix the period of maturity when the statute begins to run. See 2 Daniel on Negotiable Instruments, p. 226; Wheeler v. Warner, 47 N. Y., 519, 7 Am. Rep., 478; Herrick v. Woolverton, 41 N. Y., 581, 1 Am. St. Rep., 461. Appellant could not defeat the operation of the statute by a mere failure on his part to comply with the terms of the bonds as to presentation and demand for payment.

In the third paragraph of plaintiff's reply, he states "that the city of Paducah by its acts and proceedings has all the time since the issual of the bonds and coupons sued on herein recognized same as its bonds and indebtedness, and within fifteen years last past before the beginning of this suit the city of Paducah, by its mayor and council, has admitted and acknowledged defendant's indebtedness for said bonds and coupons sued on, and agreed and promised to pay same." The averments of this paragraph are equally ineffectual to take the case out of the statute—first, because the suit is upon the original promise of the city to pay the bonds, and it is not alleged that the recognition by the city, and the promise to pay them, was made before the bar, and within the statutory period, and at a time when it was legally bound to pay them. But this defense would be unavailing, even if the averments of the reply had been technically within the rule, for the reason that the mayor and council of a municipal corporation have no power or authority to

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extend the liability of the city for its indebtedness beyond the express terms of the instrument evidencing such liability, without legislative authority, express or implied. In Clark v. Des Moines, 19 Iowa, 199, 87 Am. Dec., 428, Judge Dillon states the law on this subject with great force and perspicuity in these words: "The general principle of law is well known and definitely settled that the agents, officers, or even city council, of a municipal corporation, can not bind the corporation when they transcend their lawful and legitimate powers. This doctrine rests upon this reasonable ground: The body corporate is constituted of all the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are mere public agents of the corporators. Their duties and powers are prescribed by statute. Every one, therefore, may know the nature of these duties and the extent of these powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule that the corporation is bound only when its agents, by whom, from the very necessities of its being, it must act, if it acts at all, keep within the limits of their authority. Not only so, but such a corporation may successfully interpose the plea of ultra vires; that is, set up as a defense its own want of power under its charter or constituent statute to enter into a given contract or to do a given act in violation or excess of its corporate power and authority." See, also, Dillon on Municipal Corporations (4th Ed.), 291, and Smith's Modern Law of Municipal Corporations, sections 186, 246, 247. Nor does the fact that the city of Paducah may have levied and collected a tax for the purpose of meeting the bonds and coupons sued on have the effect to extend in any wise the statutory period of

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limitation in which a suit could be maintained upon the bonds. The city might very properly, during the life of the bonds, have made provision for their payment upon presentation and demand as stipulated in the bond. But this fund did not become a trust fund for the payment of the obligations from which the city had been exonerated by the lapse of time and the statute of limitations. We are therefore of the opinion that the chancellor properly sustained a demurrer to the reply, and, upon appellant's failure to plead, dismissed his petition.

Judgment affirmed.

CASE 38—PROSECUTION AGAINST EZRA HYSER FOR VIOLATION OF THE LOCAL OPTION LAW.—OCT. 9.

116 410
123 613
116 410
127 704

Hyser v. Commonwealth.

APPEAL FROM HART CIRCUIT COURT.

FROM SO MUCH OF THE JUDGMENT AS REQUIRES THE DEFENDANT TO GIVE BOND FOR HIS GOOD BEHAVIOR HE APPEALS. REVERSED.

LOCAL OPTION LAW—VALIDITY OF AMENDMENT—REQUIRING BOND FOR GOOD BEHAVIOR.

Held: 1. Act March 11, 1902 (Acts 1902, p. 41, chap. 14), entitled "An act for the better enforcement of" the local option act of March 10, 1894 (Acts 1894, p. 123, chap. 52), "and to amend section 4" thereof, and which defines the essentials of an indictment for a violation of the law, makes it unlawful for any person to furnish another liquor in a local option district, declares that the possession of a United States license shall be prima facie evidence of guilt, authorizes the court to require one on a second conviction to give a bond for his good behavior, provides that the place of sale of liquors shipped into a local option district shall be the place where the money is paid or goods delivered, and prohibits the sale of liquor in any local option dis-

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trict, relates only to one subject, which is expressed in its title, within Constitution, section 51.

2. Act March 11, 1902, section 3 (Acts 1902, p. 42, chap. 14), providing that on the second or any subsequent conviction for, a violation of the local option law the court shall require the defendant to execute a bond for his "good behavior" for twelve months, is not void for uncertainty because of the use of the phrase "good behavior."

3. The section is not unconstitutional as imposing double punishment, the requirement of the giving of the bond, if regarded as a punishment, being not for the former offenses, but such former offenses merely aggravating the last offense, and the provision being merely declaratory of the common law.

4. Act March 11, 1902, section 3 (Acts 1902, p. 42, chap. 14), providing that "on the second or any subsequent conviction for a violation" of the local option law the court shall require defendant to execute a bond for his good behavior, refers to a conviction of defendant for an offense committed after his conviction for a previous offense.

S. M. PAYTON, FOR APPELLANT.

1. We contend that the amendment to the local option law of this State approved March 11, 1902, is in violation of section 51 of the Constitution, as it relates to more than one subject—one inhibiting the illegal sale of spirituous liquors, another requiring persons to give bond for their good behavior, and a third providing that one charged with a criminal offense may be convicted upon a presumption of law artificially created by the Legislature and not upon the oral testimony of witnesses brought face to face with the accused.

2. We contend that section 3 of said amendment is void for uncertainty. "To be of good behavior" is a very vague and indefinite expression. By section 382 of the Criminal Code it is specifically provided for what reasons one may be lawfully required to keep the peace and be of good behavior, but not so in this act.

3. We confidently claim and urge that the amendment, at least that portion of it requiring the bond upon a second or any subsequent conviction is unconstitutional as being double punishment.

AUTHORITIES CITED.

Fisher v. Com., 1 Bush, 211; State of West Virginia v. W. M. Gilliland, L. R. A., 426; Constitution, sec. 51; 12 Bush, 394, 198; 13 Bush, 467.

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CLIFTON J. PRATT, ATTORNEY GENERAL, AND M. R. TODD, FOR APPELLEE.

1. It can not be said that the taking of a bond from one who has violated the statutes and for his "good behavior" is foreign to the subject expressed in the title to the act of March 11, 1902, amending the local option law which is as follows: "An act for the better enforcement of an act approved March 10, 1894, entitled An act whereby the sense of the people of any county, city, town, district or precinct may be taken as to whether spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, and to amend section 4 of said act."

2. We do not think there is much ground for contention that said act of March 11, 1902, is void for uncertainty because it does not in apt words say what is meant by "good behavior."

3. The case of W. Virginia v. Gilliland, cited by counsel, is not in point. He was not twice put in jeopardy for the same offense. But considering that the security for his good behavior was a punishment, it can not be denied that the Legislature had the right to increase the punishment for the second or any subsequent offense. Collins v. Henderson, 11 Bush, 74; Chiles v. Drake, 2 Met., 150; Phillips v. Bridge Co., 2 Met., 222; Johnson v. Higgins, 3 Met., 569; Smith v. Cochran, 8 Bush, 112.

OPINION OF THE COURT BY JUDGE SETTLE—REVERSING.

The appellant, Ezra Hyser, was convicted in the lower court under each of four indictments for selling spirituous liquors in violation of the local option law, his punishment in three of the cases being a fine of $60 each, and in the fourth a fine of $100. The fines, together with the costs of the prosecutions, were immediately paid by him. It appears from the record that the four convictions of appellant occurred at the same term of court, and the last two of them on the same day, and that these convictions were had under the provisions of an act of the Legislature of Kentucky amendatory of the general local option law, approved March 11, 1902. Acts 1902, p. 41, c. 14. There are two sections of this amendment imposing penalties for a violation of the act. Section 2 provides that "it shall be unlawful for any person to sell, lend, give procure for or

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furnish to another any spirituous, vinous or malt liquors, or have in his possession spirituous, vinous or malt liquors, for the purpose of selling them in any territory where said act is in force, and any person so offending shall be fined not less than fifty, nor more than one hundred dollars, and imprisoned not less than ten nor more than fifty days." It will be observed that the object of the foregoing section is not the punishment of the person who himself sells or otherwise disposes of spirituous, vinous, or malt liquors where local option is in force (for his punishment is provided for by section 5 of the act), but its object is the punishment of those who shall sell, lend, give, procure for, or furnish to another such liquors to be sold by the latter where local option is in force, or for having in their (the former's) own possession such liquors for the purpose of selling them in the forbidden territory. Section 5, under which appellant was convicted, takes the place of section 4 of the original act, and its object is the punishment of any person who sells liquors where local option is in force. Its language embraces any sale, barter, or loan of spirituous, vinous or malt liquors that may be "directly or indirectly" made within the inhibited territory. This section also makes it an offense for any person to knowingly furnish or rent a house room, wagon, or any conveyance or thing in which such liquors are sold, bartered or loaned. And the punishment prescribed for the offenses named in this section is a fine of not less than $60 nor more than $100, or imprisonment in jail not less than ten nor more than fifty days, or both fine and imprisonment, in the discretion of the court or jury. Section 3 of the amendment provides that "on the second or any subsequent conviction for a violation of said act, or any of its amendments, the court shall require the defendant to execute bond in the sum of $200.00

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to be of 'good behavior' for the period of twelve months." A subsequent paragraph of section 3 allows the court, in its discretion, to increase the amount of the bond, and, if the bond be not given, to commit the defendant to jail for a period not exceeding ninety days, to be fixed by the court. During the same term of the court at which the four convictions of the appellant were secured, and on the same day of his conviction on each of the two indictments last tried, a rule was issued against him by order of the court, returnable on the tenth day of that term, requiring him to give bond as provided by section 3 of the act, supra. Appellant appeared in obedience to the rule, and filed a response thereto, which the court held insufficient; whereupon the rule was made absolute, and it was adjudged that he execute bond in the sum of $200 for his "good behavior" for a period of twelve months, and upon his failure to do so that he be confined in jail ninety days. The bond was not executed by him, and we are now called upon to consider the questions of law raised by the appeal of the case to this court.

No complaint is made of the action of the lower court in the matter of the fines imposed under the indictments, but it is contended for appellant that the court had no authority to require of him the execution of the bond, because (1) the act of March 11, 1902, is in violation of section 51 of the State Constitution, in that it relates to more than one subject; (2) that section 3 of the act is void for uncertainty; and (3) that the act imposes a double punishment. Section 51 of the Constitution provides that "no law enacted by the General Assembly shall relate to more than one subject and that shall be expressed in the title." The title of the act approved March 11, 1902, is as follows: "An act for the better enforcement of an act approved March 10, 1894,

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entited 'An act whereby the sense of the people of any county, city, town or district, or precinct may be taken as to whether spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, and to amend section 4 of said act.'" The general subject of the act is the better enforcement of the "local option law," and is so expressed in its title. Though embracing one or more offenses that are not to be found in the original law of which it is an amendment, it contains no provision that is not germane to the subject expressed in the title, and, as a whole, its meaning is so obvious that it can be readily understood by a person of ordinary intelligence. This court has repeatedly announced, in effect, that no provision of a statute directly or indirectly relating to the subject expressed in the title, having a natural connection therewith, and not foreign to the same, should be deemed within the inhibition of section 51 of the Constitution, which provides that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title." Chiles v. Drake, 59 Ky., 146, 74 Am. Dec., 406; L. & O. T. R. Co. v. Ballard, 59 Ky., 165; Jacobs' Adm'r v. L. & N. R. R. Co., 73 Ky., 263; Allen v. Hall, 77 Ky., 85; McArthur v. Nelson, 81 Ky., 67, 4 R., 754; Commonwealth v. Godshaw, 92 Ky., 435, 13 R., 572, 17 S. W., 737; Conley v. Commonwealth, 98 Ky., 125, 17 R., 678, 32 S. W., 285; Weber v. Commonwealth, 24 R., 1726, 72 S. W., 30. Tested by the foregoing rule, the statute in question is not repugnant to section 51 of the Constitution, and we so decide.

We are not disposed to agree with appellant's contention that so much of section 3 of the act, supra, as empowers the court, after two convictions for a violation of its provisions, to require of the person so convicted a bond for his "good behavior," is void for uncertainty because it

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fails to indicate in express language what is meant by the words "good behavior." Section 382 of the Criminal Code provides that "a person may be arrested for the purpose of requiring of him security to keep the peace, or for his good behavior." The grounds for such arrest are set forth in subsections 1, 2 and 3 of section 382; but the Code nowhere defines the meaning of the term "good behavior." It is, however, an expression as old as the common law. Behavior is the mode of conducting one's self, and is used to express one's manner of living. To be put upon one's "good behavior" is to be in a state of trial, in which something important depends on propriety of conduct. Therefore the legal signification of the expression "good behavior," as used in the statute supra, is that one who is placed under bond for his "good behavior," as therein authorized, is to be in a state of trial or probation with respect to the subject-matter of the statute. He must, for a given time, behave with such propriety of conduct as to make himself amenable to the statute. In other words, he must keep within its letter and spirit by refraining from any further violation of its provisions during the period of probation, otherwise he or his surety will have to pay the penalty named in the bond. We are of the opinion, therefore, that the meaning of the words "good behavior," found in the statute is so well known, and their connection with the intent and purpose of the statute so patent, that they can not fail to be understood by persons of ordinary intelligence, and, if so, it follows that the statute can be neither uncertain nor void in the particular complained of.

We are likewise unable to sustain the third and last contention of appellant's counsel that the statute supra as amended, or that part of it requiring the bond upon a second or any subsequent conviction, imposes double pun-

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ishment, and is therefore unconstitutional. If it be conceded that the judgment requiring the convicted person to enter into bond for good behavior is punishment, that is a part of the penalty inflicted by virtue of the provision of the statute. It is a punishment which falls under the head of "preventive justice," Blackstone's Com., vol. 4, p. 252. The only actual punishment, however, that could result to the appellant from the requisition of the judgment as to the giving of the bond would arise from his failing to execute it, as his imprisonment in jail for the period of ninety days would be the consequence. The law makes a distinction between the one-time offender and the hardened offender, or criminal, for the former may amend his way, become a good citizen, and thereby atone for his one act of wrongdoing, while the repeated offenses of the latter may so provoke the majesty of the law as to compel the infliction upon him of its severest penalty, and even a repetition thereof as a complete deterrent, if demanded by the public good. This principle has been recognized by the lawmaking power of our State, and carried into effect by the repeated adjudications of this court. For instance, section 1130, Kentucky Statutes, 1899, provides that any person convicted a second time of felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary not less than double the time of the first conviction, and, if convicted a third time of felony, he shall be confined in the penitentiary during his life. The validity of this statute has been repeatedly upheld by this court upon the ground that it is not in violation of the constitutional provision that no one for the same offense shall be twice put in jeopardy. The increased punishment is not for the former offenses, but the previous convictions merely ag-

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gravate the last offense and add to its punishment. The accused is not required to answer to the former charges and defend against them. Nothing is heard in reference to the former trials save the fact of conviction. Mount v. Commonwealth, 2 Duv., 93; Taylor v. Commonwealth, 3 Ky. Law Rep., 783; Boggs v. Commonwealth, 9 R., 342, 5 S. W., 307; Chenowith v. Commonwealth, 11 R., 561, 12 S. W., 585; Wharton v. Commonwealth, 7 Ky. Law Rep., 826. There was a discretionary jurisdiction at common law in the court trying a person charged with misdemeanor to bind the accused after conviction, and, as a part of the judgment, to good behavior for a time, and such jurisdiction was inherent in every court of record having criminal jurisdiction. "If a person have been convicted of a misdemeanor, it is usually part of the judgment that he shall find security for his good behavior for some time." 9 Bacon's Abr., 309. "This requisition of sureties has been several times mentioned before as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors; but there, also, it must be understood rather as a caution against the repetition of the offense than any immediate pain or punishment." Bl. Com., vol. 4, p. 251. It will be observed, therefore, that section 3 of the statute supra, in requiring security for good behavior of the person convicted, follows, and is but declaratory of, the common law. An examination of the case of State v. Gilliland (W. Va.), 41 S. E., 131, 57 L. R. A., 426, which is strongly relied on by counsel for appellant, will show that it is not in conflict with the view herein expressed. In that case the defendant was convicted under indictment for fraudulently selling spirituous liquors by retail without license, and his punishment fixed at a fine of $15. In addition he was required by the court to give bond in the sum of $500 for his good behavior, and "not

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to sell intoxicating drinks contrary to law for the period of twelve months." The indictment was under section 3, c. 32, Code W. Va., 1899, which prescribes as punishment for the offense of which the accused was convicted a fine of not less than $10 nor more than $100, and, at the discretion of the court, imprisonment in the county jail not exceeding three months. It appears from the opinion of the Supreme Court of West Virginia in the case supra that the Criminal Code of that State contains no provision authorizing the trial court to require such a bond as was attempted to be exacted of the person convicted; hence it was held that, as the offense of which he stood convicted was not an offense at common law, but purely one of statutory creation, the court was without jurisdiction to impose a common-law punishment, but was restricted to the infliction of the penalty prescribed by the statute, which did not include the authority to require of the accused a bond for his good behavior, but only subjected him to a fine and imprisonment in jail not exceeding three months. It is the law in Kentucky, as in West Virginia, made so by statute, that a common-law offense, for which punishment is prescribed by statute, shall be punished only in the mode so prescribed; but in the case at bar the offense as well as the punishment is statutory, and our statute, unlike that of West Virginia, expressly confers upon the court jurisdiction to require such a bond as appellant was adjudged to execute—that is to say, this jurisdiction is not derived from the common law, but it is conferred by the very letter of the statute. For the reasons indicated, we are of the opinion that the case of State v. Gilliland can not be accepted as authority in point.

But while we are unable to sustain the objection raised against the statute under consideration by counsel for appellant, we are nevertheless constrained to hold that the action

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of the lower court in requiring of appellant the bond in question was premature. The authority for requiring bond conferred upon the court by section 3 of the amendment may be exercised by the court only "on the second or any subsequent conviction for a violation of the act [local option law] or any of its amendments." In our opinion, the words "second or any subsequent conviction" refer to a conviction of the accused for an offense against the statute committed after his conviction for a previous like offense. In requiring of the offender a bond for his good behavior, the aim of the statute is two-fold: First, to prevent further violation of its provisions; second, to effect the reformation of the offender. How can the latter object be attained, and what opportunity for reformation would be afforded him, unless the construction here suggested should obtain? In Brown v. Commonwealth, 100 Ky., 127, 18 R., 630, 37 S. W., 496, the appellant, at the June term, 1896, of the Lincoln circuit court, was indicted upon two charges of breaking into a warehouse. These indictments were returned on the same day. He pleaded guilty to each, and, after verdicts fixing his punishment at five years' imprisonment in the penitentiary in each case, was sentenced. On the day following the sentence in each of these cases he was again indicted, the last indictment charging him with the crime of feloniously breaking into and entering a dwelling house, and also setting up the two former convictions for felony at the same term. Upon the trial, and notwithstanding his plea of not guilty, the jury found him guilty, fixed his punishment at confinement in the penitentiary for life, and the court sentenced him accordingly; all of which was done pursuant to section 1130, Kentucky Statutes, 1899. An appeal was taken, and in construing that section of the statute this court said: "The question presented for de-

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cision is whether the statute in question authorizes the imposition of the increased penalty for an offense not committed after the original convictions. We think not. The statute was manifestly intended to provide an increased penalty for a subsequent offense, in order to deter the offender from its repetition. . . . The reformatory object of the statute, namely, to provide a deterrent from future crime, would not be effected by a construction which gives to the offender no opportunity to reform. Moreover, doubtful questions as to the severity of the penalty are to be resolved in favor of the accused. . . . We are of the opinion that the words 'convicted a second time of felony,' and 'convicted a third time of felony,' must be restricted to felonies committed subsequent to the dates of the convictions relied on to effect an increase of the penalty, for otherwise no *locus paenitentiae* would be offered to the accused." We do not feel at liberty to depart from the rule thus announced by this court, and hence must hold that the action of the lower court requiring of the appellant the bond for good behavior in this case was unauthorized, because such action was taken before there was a second or subsequent conviction of the appellant for the violation of the local option law in the meaning of the statute.

Wherefore the judgment of the lower court requiring of appellant the execution of the bond is reversed, and cause remanded for further proceedings consistent with the opinion herein.

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CASE 39—ACTION BY L. R. PORTER'S ASSIGNEE AGAINST LELIA DOWNER AND OTHERS TO SUBJECT CERTAIN REAL ESTATE TO THE PAYMENT OF CREDITORS.—OCT. 8.

Downer, &c., v. Porter, &c.

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f135 170

APPEAL FROM WARREN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFFS AND DEFENDANTS APPEAL. AFFIRMED.

ASSIGNMENT FOR BENEFIT OF CREDITORS—ACTION BY ASSIGNEE—NATIONAL BANKRUPTCY ACT—LIMITATION OF ACTIONS—ATTORNEY AND CLIENT—NOTICE TO ATTORNEY—EFFECT ON CLIENT.

Held: 1. Kentucky Statutes, 1899, section 84, provides that if an assignor for the benefit of creditors, before making the deed, shall have made a preferential or fraudulent transfer of any of his property, it shall vest in the assignee, who shall have the remedies of a creditor. Act 1856 (Kentucky Statutes, 1899, section 1910) enacts that every sale made by a debtor in contemplation of insolvency, and with a design to prefer one creditor, shall operate as an assignment for the benefit of his creditors; and by section 1911 such transfers are subject to the control of equity on petition of any one interested. The national bankruptcy act makes it an act of bankruptcy for a debtor to make an assignment for the benefit of his creditors, or to prefer one creditor over another. HELD, that the fact that when an insolvent made a conveyance of real estate and when he subsequently made an assignment for the benefit of creditors the national bankruptcy act was in force did not preclude the assignee from suing to bring the property conveyed into the trust fund, the act of 1856 not being an insolvency act which could be superseded by the bankruptcy act, and the transaction being within the jurisdiction of the State courts under its statutes until attacked in the Federal courts as an act of bankruptcy.

2. Kentucky Statutes, 1899, section 1911, makes a transfer by a debtor in contemplation of insolvency subject to the control of equity on a petition of any one interested who files a petition within six months after the delivery of the property. HELD, that "delivery of the property" means a visible change of possession, and, where a house was conveyed, the mere fact

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that the tenant therein attorned to the grantee, and thereafter paid her rent, did not constitute a delivery sufficient to set the statute in motion.

3. Where the attorneys for an insolvent learned from him that he had conveyed certain land, and subsequently they were employed by the insolvent's assignee for the benefit of creditors, their knowledge of the deed was not chargeable to the assignee.

W. B. GAINES, ATTORNEY FOR APPELLANT.

POINTS AND CITATIONS.

1. Appellee took no title to the property in controversy by the deed of assignment from L. R. Porter, because:

(a) The Kentucky assignment act is superseded and suspended by the bankrupt act of 1898, Sec. 75, Ky. Stats.; Bankrupt Act, sec. 3, subsecs. 4 and 1; Parmenter Mfg. Co. v. Hamilton, 172 Mass., 178; Harbaugh v. Costello, 56 N. E., 363, Ill.; Ketcham v. McNamarra, 50 L. R. A., 641 (Conn.).

The act of 1856 is certainly superseded and suspended. Ketcham v. McNamarra, supra; Bankrupt Act, sec. 60.

(b) If the deed had any force it was a common law deed of assignment and the assignee took only such property as the assignor had at the date of the assignment. Boese v. King, 108 U. S., 507.

2. The law of 8167 is radically different from the law of 1898 when Ebersole & McCarty v. Adams, 10 Bush, 83, and Linthicum v. Fenley were decided in this (a) every deed of assignment is a fraud upon the Bankrupt Act (sec. 3, subsec. 4) and proceedings to wind up insolvent are forbidden to the State courts by the concluding clause of the act of 1898.

3. The conveyance not being acknowledged or a recordable instrument possession by appellant for more than six months before the institution of the suit barred the action. Ky. Stats., sec. 1911; Temple Barker & Co. v. Poyntz, 2 Duv., 276; Cogar v. Stewart, 78 Ky., 59.

4. Appellee, as a matter of fact, knew of the transfer for more than six months before the institution of the suit. On March 4, 1901, appellant's attorneys knew of the transfer and their knowledge is the knowledge of the appellant. Harrington v. U. S., 11 Wall., 356; May v. LeClaire, 11 Wal., 217.

SIMS & GRIDER, ATTORNEYS FOR APPELLEES.

POINTS AND AUTHORITIES.

1. National bankrupt law does not suspend State assignment law, and where an assignment is made under the State law, all

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steps taken thereunder are valid and binding, in case there is no petition filed in bankrupty. Boese v. King, 108 U. S., 379; Simonson v. Sinscheiner, 95 Fed. Rep., 948.

2. Knowledge of attorney as to any fact before relation of attorney and client existed is not deemed the knowledge of the client. Am. & Eng. Ency. of Law, vol. 3, p. 322 (2d ed.).

3. Where possession for more than six months is relied on to defeat an action to set aside a fraudulent conveyance that possession must be open and ostensible and such as to put creditors upon inquiry as to the ownership of the property. Brown v. Early, 2 Duv., 371.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

L. R. Porter, who was at the time insolvent, conveyed on February 10, 1901, to appellant Downer, a house and lot in consideration of a pre-existing debt. On March 4, 1901, Porter assigned to appellee for the benefit of his creditors, and he subsequently brought this suit on October 22, 1901, to have the property brought into the trust fund for the equal payment of all the creditors of Porter under section 84, Kentucky Statutes, 1899: "If the assignor before making the deed shall have made a preferential or fraudulent transfer, conveyance or gift of any of his property or a fraudulent purchase of any property in the name of another, the property so fraudulently transferred, conveyed or purchased shall vest in the assignee, and it shall be his duty to institute such proceedings as may be necessary to recover the property so conveyed or disposed of, and to this end he shall have the remedies which the creditors or any of them might exercise. If the assignee upon demand shall refuse to institute such proceedings, any creditor may do so, and property so recovered shall become a part of the estate, and be distributed as other assets." Section 1910, Kentucky Statutes, 1899, commonly known as the "Act of 1856," further provides that every sale made by a debtor in contemplation of insolvency, and with the design to prefer one or

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more creditors to others, shall operate as an assignment of all of the property of the debtor, and shall inure to the benefit of all his creditors. By section 1911 such transfers are subject to the control of courts of equity upon the petition of any person interested, filed within six months after the transfer is lodged for record or the delivery of the property. When the transaction in question took place, the United States bankruptcy act was in effect. By that statute it is made an act of bankruptcy that the debtor has made an assignment for the benefit of his creditors, or has preferred one creditor to others. It is insisted for appellant that, the United States bankruptcy statute being in effect when the transaction took place, and making it an act of bankruptcy, the State statute was superseded by the act of Congress, and no action can now be maintained under the State statute. In support of this position we are referred to a number of decisions in other States to the effect that all State insolvency laws are suspended when the paramount jurisdiction of Congress has once been exercised. See 5 Cyc., 240. But our act of 1856 is not an insolvency law within the meaning of this rule. The precise question was presented in Ebersole v. Adams, 73 Ky., 83, where the court, speaking of the act of 1856, said: "This act is not a bankrupt law, nor an insolvent act. It has none of the characteristics of either, except that it provides for the appropriation of the property of the debtor to the payment *pro tanto* of all his creditors. An assignment or transfer made in contemplation of insolvency and to prefer creditors is an act of bankruptcy under the act of Congress, but this fact does not deprive creditors of the right to apply to the State courts for relief in case they choose to do so. Notwithstanding the Federal bankrupt act, the State courts have full and complete power to relieve against all frauds,

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actual or constructive, except in cases in which a court of bankruptcy has first taken jurisdiction, or where the relief asked in the State courts is subversive of the rights of parties to a pending proceeding in bankruptcy subsequently instituted." This was reiterated in Linthicum v. Fenley, 74 Ky., 131. In Simonson v. Sinsheimer, 95 Fed., 948, 37 C. C. A., 337, it was held by the United States Circuit Court of Appeals that an assignment for the benefit of creditors is valid under the present bankruptcy statute if not impeached by a petition in bankruptcy filed within four months after its execution, and in that case the validity of the proceedings of the State court under the deed of assignment which had not been impeached by a petition in bankruptcy was recognized. This was the rule under the former bankrupt act, and there is nothing in the new act to show that Congress intended to change it. Mayer v. Hellman, 91 U. S., 496, 23 L. Ed., 337. The provision of the present statute that "proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it" has no application, for the reason that it was only intended to take such pending proceedings out of the operation of that act; and, besides, the act of 1856, as shown, is not a State insolvency law. Any fraudulent conveyance of property is an act of bankruptcy under the Federal statute, no less than the making of a deed of assignment for the benefit of creditors, or the preferring of one creditor to others. And if the act of Congress making these things acts of bankruptcy supersedes the State laws giving remedies therefor, then it would follow that since the passage of the bankruptcy act a creditor can not take out an execution in the State courts on a judgment, and subject property thus fraudulently conveyed, or subject it in an attachment proceeding or upon a return of no

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property, although no petition in bankruptcy had been filed in the Federal court impeaching the transactions as acts of bankruptcy. This was not the meaning of the act of Congress, and, the matters complained of having never been impeached as acts of bankruptcy, the State courts have jurisdiction to take charge of the property and distribute the proceeds ratably among all the creditors. It is fairly settled by the authorities that the State courts may do this in the case of a voluntary assignment for the benefit of creditors which has not been attacked as an act of bankruptcy. The statute quoted above vests in the assignee not only the property conveyed to him by the assignor, but also all the property conveyed away by the assignor by a preferential or fraudulent transfer. The circuit court, in adjudging the property in contest to the assignee, only carried out the statute. If the State courts may enforce voluntary assignments for the benefit of creditors, they may certainly enforce a statute like this, merely regulating what property shall vest in the assignee under the deed of assignment. See Louisville Trust Co. v. Comingor, 184 U. S., 18, 22 Sup. Ct., 293, 46 L. Ed., 413; Beese v. King, 108 U. S., 379, 2 Sup. Ct., 765, 27 L. Ed., 760; *In re* Scholtz (D. C.), 106 Fed., 834; *In re* Worcester County, 102 Fed., 808, 42 C. C. A., 637; *In re* Romanow (D. C.), 92 Fed., 510; Patty-Joiner, etc., Co. v. Cummins, 93 Tex., 598, 57 S. W., 566; Armour Packing Co. v. Brown, 76 Minn., 465, 79 N. W., 522; Binder v. McDonald, 106 Wis., 332, 82 N. W., 156.

At the time the conveyance was made the house was rented out, and the tenant attorned to appellant, and thereafter paid her the rent; but there was no visible change of possession, and the deed was not recorded. The delivery of the property, within the meaning of the statute defining the time within which the action must be brought, means

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a visible change of possession, and the mere fact that the tenant paid rent to the vendee is not sufficient to set the statute in motion.

Sims & Grider were Porter's attorneys, and advised him not to make the conveyance. He, however, made it, contrary to their advice. After the assignment was made, they were employed by the assignee, but did not inform him of the deed to appellant, as they had acquired knowledge of this deed from Porter while he was their client. It is urged that the assignee must be charged with the knowledge of his attorneys as to the existence of the deed. This would be true if Sims & Grider had learned of the deed as his attorneys, but he is not chargeable with knowledge thereof which they acquired as the attorneys of Porter, and before their employment by him. An attorney is not required to disclose to one client the secrets of another intrusted to him professionally by the other client in the transaction of his business. Were the rule otherwise, a man could not safely advise with his attorneys, because he could not foresee by whom they might be thereafter employed, or what use might be made of the facts communicated to them. On the questions of fact involved we can not, under the evidence, disturb the chancellor's conclusion.

Judgment affirmed.

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CASE 40—ACTION BY ABE BOGARD AGAINST ILLINOIS CENTRAL RY. CO. FOR PERSONAL INJURIES.—OCT. 13.

Bogard v. Illinois Central Railway Co.

116 429
128 755

APPEAL FROM M'CRACKEN CIRCUIT COURT.

JUDGMENT DISMISSING PLAINTIFF'S ACTION AND HE APPEALS. REVERSED.

RAILROADS—PERSONAL INJURIES—INDEFINITENESS OF PETITION—TIME, PLACE AND TRAIN—WHEN COURT SHOULD ORDER BILL OF PARTICULARS.

Held: 1. Where, in an action against a railway company operating a trunk line through a certain county, with perhaps fifty miles of track therein, over which in the course of twelve months thousands of trains passed at all hours of the day and night, and operated by hundreds of different employes, the complaint alleged that within the last twelve months the defendant, while engaged in operating its road in the county, negligently injured plaintiff by running its engine and train over him, the court had the power to require plaintiff to furnish a bill of particulars averring the time when and place where the accident occurred, whether during the night or day, and whether inflicted by a freight or passenger train, on defendant, showing by affidavit or otherwise that it did not have such information, nor reasonable means of obtaining it; but the court could not require plaintiff to give the number of the train producing the injury, or the names of the employes in charge thereof.

HENDRICK & MILLER, ATTORNEYS FOR APPELLANT.

In this action for damages for being run over and knocked down by one of defendant's engines in McCracken county, plaintiff's petition was dismissed on motion of defendant because it was not specific as to the time and place of the accident, and the number of the engine and name of the engineer thereon.

We submit that the time and place are not the essence of the controversy, except to show that the injury was inflicted within twelve months before the filing of the petition, and in the county of McCracken, and both of these allegations are made.

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If plaintiff could be required to name the day and the exact spot upon which the accident occurred then he could be required to tell the exact train that did it and name the engineer, and this to any reasonable mind is absurd.

If the defendant's employes failed to report to it the time and place of the accident and injury, it is no fault of the pleader and if they did report, then all these facts are in the possession of the defendant.

AUTHORITIES CITED.

Newman on Pleading, 489; C. & O. R. Co. v. Turner, 18 R., 1087; Com. v. Miller, 79 Ky., 451; Gratz v. Com., 96 Ky., 162; Com. v. Davis, 94 Ky., 612; Cin. Ry. Co. v. Com., 80 Ky., 137; C. & O. Ry. Co. v. Co., 88 Ky., 368; Faustre v. Com., 92 Ky., 34; Price v. Com., 4 R., 618; 79 Ky., 403; 14 Bush, 51; 84 Ky., 653; 91 Ky., 306; 92 Ky., 227.

WHEELER & HUGHES, J. M. DICKINSON AND PIRTLE & TRABUE, FOR APPELLEE.

We contend that the petition in this case does not contain such notice as is contemplated by the law that the defendant should have in order to prepare its defense.

The petition does not state whether or not plaintiff was an employe of the defendant or whether the injury was done at a public crossing, but the allegations are merely conclusions and nowhere is there any statement of facts to give notice of where or how he claims to have been injured, except that he was injured "within twelve months before October 6, 1902, and in McCracken county."

It seems to us it would be unreasonable to require defendant to bring into court every man employed by it, in a large county, running a large number of trains both ways every day of the year, during the whole year, in order to make its defense to this sort of an allegation. We insist that the plaintiff should be required to at least approximately fix the time and place of the injury.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

On the 7th of October, 1902, the appellant, Abe Bogard, brought suit against the Illinois Central Railroad Company in the McCracken circuit court to recover damages alleged to have been suffered by him by reason of certain alleged

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acts of negligence of appellee in the operation of one of its engines and train of cars in McCracken county. The petition is as follows: "The plaintiff, Abe Bogard, says that he is a citizen and resident of the State of Kentucky and County of McCracken, and that the defendant is a corporation authorized by the laws of Kentucky to operate a railroad, and is now, and was at all times hereinafter named, operating and running a railroad in and through the county of McCracken and State of Kentucky, and said defendant is empowered by law to sue and be sued, contract and be contracted with; and heretofore, and within the last twelve months, while engaged in operating and running an engine along its said road in the said county of McCracken, the defendant, without fault or negligence on the part of the plaintiff, carelessly, recklessly, and wrongfully, and by willful, reckless and wrongful act, ran its engine and train upon and against plaintiff, and knocked him down, and greatly bruised and injured his legs, thighs, hips, back, spine, arms, chest, neck and head, and made plaintiff sick and sore for many days, and plaintiff's said injuries are permanent, and he will never recover from some of same; thereby negligently inflicting upon him and causing him to suffer great bodily pain and mental agony, and causing him to lose much valuable time, and to incur doctor's bill to the amount of $25; and by said collision, caused by the negligence and wrongful act of defendant running its engine aforesaid upon plaintiff, he has been damaged in the sum of two thousand dollars ($2,000). Wherefore he prays judgment against the Illinois Central Railroad Company for $2,000, his costs herein expended, and for all proper relief." The railroad company, at the appearance term of the action, moved the court in writing to require the plaintiff, in addition to the facts alleged in his petition, to state

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the date of the injury complained of, the point where it occurred, the number of the train producing it, and the parties in charge thereof. Over the objections of plaintiff, the motion was sustained, and, declining to plead further, his petition was dismissed without prejudice, and he has appealed to this court.

The only question which arises upon the present appeal which is reviewable in this court is whether or not the court below had the power to grant the application of the defendant, and, if so, whether the facts in the case justified their exercise herein. If it has exceeded its authority, we have jurisdiction, and it is our duty to correct the error of law. There is no uncertainty or indefiniteness with respect to the nature of the charge made against the defendant. The difficulty under which the defendant claims to labor is that the plaintiff has not sufficiently specified the facts as to the time and place where the alleged acts of negligence occurred to enable it to intelligently defend the action. The defendant operates a trunk line through McCracken county, and it has perhaps fifty miles of track within the county. In course of twelve months thousands of trains pass over its road, operated by hundreds of different employes, at all hours of the day and night. The plaintiff necessarily has information as to the time and place of the accident, whether it was day or night, whether the injury was inflicted by a freight or passenger train; and a state of case might exist when it would be impossible for the defendant to secure this information, so necessary for the proper conduct of its defense. When such a case arises, the trial court has inherent power to require such information to be furnished. This question was very fully considered in the case of Commonwealth v. Snelling, 15 Pick., 321. The opinion in that case was delivered by Chief Jus-

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tice Shaw. It was held that where a person is indicted for a libel containing general charges of official misconduct against a magistrate, the court was authorized to require him previously to the trial, in case he intended to give the truth of the publication in evidence, to file a bill of particulars specifying the instances of misconduct which he proposes to prove. After a thorough review of all the authorities, he says: "The general rule to be extracted from these analogous cases is that where, in the course of a suit, from any cause, a party is placed in such a situation that justice can not be done in the trial without the aid of the information to be obtained by means of a specification or bill of particulars, the court, in virtue of the general authority to regulate the conduct of trials, has power to direct such information to be seasonably furnished, and in authentic form." In Tilton v. Beecher, 59 N. Y., 176, 17 Am. Rep., 337, in an action of "crim. con.," the application of the defendant for a bill of particulars was refused by the trial court on the ground of want of power to grant the bill. Upon appeal to the Appellate Court of New York it was held that the court below had the power to grant a bill of particulars. The opinion in that case was written by Judge Rapello, and, after a most exhaustive review of the authorities, English and American, bearing upon the question, said: "In action upon money demands consisting of various items, a bill of particulars of the dates and description of the transactions out of which the indebtedness is claimed to have arisen is granted almost as a matter of course; and this proceeding is so common and familiar that, when a bill of particulars is spoken of, it is ordinarily understood as referring to particulars of that character. But it is an error to suppose that bills of particulars are con-

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fined to actions for the recovery of money demands arising upon contract. A bill of particulars is appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put for trial with greater particularity than is required by the rules of pleading. They have been ordered in actions of libel, escape, trespass, trover and ejectment, and even in criminal cases, on an indictment for being a common barrator, on an indictment for nuisance," etc., and concludes as follows: "A reference to a few of the authorities upon which these decisions were founded will show that in almost every kind of case in which the defendant can satisfy the court that it is necessary to a fair trial that he should be apprised beforehand of the particulars of the charge which he is expected to meet the court has authority to compel the adverse party to specify those particulars so far as in his power." A full discussion of the law applicable to motions of this character is found in 3 En. of P. & Pr., 517. The author says: "There is no inflexible rule as to the class of cases in which a bill of particulars will be granted, but it rests within the sound judicial discretion of the court, to be exercised only in furtherance of justice." "But the rule is quite well established that a party will not be obliged to furnish facts already known to his adversary, nor when the means of ascertaining the facts are equally accessible to both parties." We are of the opinion that, upon a proper showing that defendant did not have the information, or the means of readily ascertaining the time when and place where the accident occurred, and whether it occurred during the day or night, or was inflicted by a freight or passenger train, that the plaintiff should be required to furnish such information, if in his power. But it is not necessary or proper in an action

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for personal injuries that the petition should set out specifically the injuries complained of, or the details of the alleged acts of negligence of the defendant in inflicting the injury. In our opinion, the trial court erred in sustaining the motion to require the plaintiff to give the number of the train producing the injury, or the names of the parties in charge thereof. It is not at all probable that such information is in his possession, and, if the identity of the train inflicting the injury is established, the means of ascertaining these facts are more accessible to the defendant than to the plaintiff. Nor should the motion have been sustained at all without some showing by the defendant by affidavit or otherwise that it did not have the required information, or reasonable means of obtaining it.

The judgment of dismissal is therefore reversed, and cause remanded for proceedings not inconsistent with this opinion.

CASE 41—ACTION BY MARY HUNT AGAINST T. J. SANDERSON FOR SLANDER.—OCT. 13.

Sanderson v. Hunt.

APPEAL FROM GRAVES CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

BANKRUPTCY—DISCHARGE—EFFECT ON JUDGMENT FOR SLANDER.

1. The bankruptcy act of July 1, 1898, provides that a discharge in bankruptcy shall release a bankrupt from all provable debts excepting among others, judgments in actions for wilful and malicious injury to the person of another. HELD, that a slander is necessarily a wilful and malicious act, and a discharge in bankruptcy does not release the bankrupt from liability for such judgment.

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BUGG & WICKLIFF, ATTORNEYS FOR APPELLANNT.

The appellee having recovered a judgment against appellant for $3,500 for slander, on motion of appellee for a *capias ad satisfaciendum* against appellant, he, appellant, offered to file answer, setting up his discharge in bankruptcy as a defense and discharge of said judgment, which the court refused to allow him to file, and awarded the writ and the only question in this case is whether a discharge in bankruptcy operates to discharge a judgment against the bankrupt for slander.

It is admitted that the judgment for slander was obtained in an action wherein the speaking of wilful and malicious words by appellant was alleged by appellee. It is also admitted that appellant, in his petition in bankruptcy, scheduled this judgment as a provable debt and was duly discharged therefrom if, indeed, a debt of this character is by law dischargeable.

We contend that a slander is not an "injury to the person or property of another," within the meaning of the exception in the bankruptcy act.

It is true that slander is an injury to the character or the reputation, but this is an injury to a personal attribute and not an injury to the person.

"An injury to the person is defined to be a hurt or damage to a man's person, such as a cut, a bruise, or broken limb, or the like, as distinguished from an injury to his property or his reputation."

AUTHORITIES CITED.

Sec. 17, Bankruptcy; Black's Law Dictionary; Civil Code, Ky., secs. 73 and 74; Dragoo v. Levi, 2 Duvall, 520; Am. & Eng. Ency. of Law (1st ed.), p. 403 and notes; Calloway v. Laydon, 47 Iowa (29 Am. Rep., 489).

D. G. PARK, ATTORNEY FOR APPELLEE.

We contend that according to common law definitions, the wilful and malicious injury or wrong which will sustain an action for slander or libel, is clearly classified under the terms "injuries to the person."

Mr. Black in his definition quoted by counsel for appellant, says "the phrase," as defined by him, "is chiefly used in connection with actions for tort for negligence."

Certainly the Congress of the United States in enacting the bankrupt law did not have in mind our Civil Code classification of forms of actions, but used common law terms comprehensive enough to embrace judgments for all wilful and malicious in-

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juries to the person in the prosecution of any former kind of action.

We have refrained from a discussion of "wilful and malicious injuries" affecting "the relative or domestic rights of persons," or "the right of personal liberty" or "the right of private property," because the injury for which appellee's judgment was rendered is comprehended in the "injuries affecting the right of personal security."

AUTHORITIES CITED.

Bankrupt Law, sec. 17; McDonald v. Brown (R. I.), 51 Atl. Rep., 213; S. C., 58 L. R. A., 768; Colwell v. Tinker (N. Y.), 62 N. E. Rep., 668, 670; S. C., 58 L. R. A., 765; In re Freche, 109 Fed. Rep., 620-1; Sutherland on Statutory Construction, secs. 289, 247; see also 245, 246, 249, 250, 254; Bishop on the Written Law, secs. 92d, 93, 103; Cooley's Blackstone (3d ed.), vol. 1, pp. 128, 129, 134; Idem., vol. 2, pp. 118, 137; see also 5 Cyc., 402-3, and note 58.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

Appellee recovered a judgment against appellant for the sum of $3,500 in an action for slander. The writ of *capias ad satisfaciendum* was awarded appellee. Appellant, by proceedings had in bankruptcy subsequent to the judgment, was discharged of all of his provable debts. He included in his schedule of liabilities the judgment above named. The question for decision here is, was that judgment a liability from which the bankrupt was discharged under the act of Congress of July 1, 1898 (30 Stat., 550, c. 541 [U. S. Comp. St., 1901, p. 3418]). Section 17 of chapter 3 of the bankrupt law of 1898 (30 Stat., 550 [U. S. Comp. St., 1901, p. 3428]) provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for

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wilful and malicious injuries to the person or property of another. . . ." It is conceded that, unless this claim falls within the provision of "wilful and malicious injuries to the person or property of another," the exception mentioned in the act would not apply, and appellant would be discharged. An essential element of every slander is that it shall have been maliciously uttered. Any act that is done unlawfully and maliciously is necessarily willfully done; that is, it is done of the volition of the actor. A slander is necessarily a willful and malicious act.

It is argued for appellant that the injury done by a slander is neither to the person nor to the property of the one about whom it is spoken. At common law the right of personal security consists in a person's legal and uninterrupted enjoyment of his life, of his limbs, his body, his health, and his reputation. Of the "rights of persons," referred to by Blackstone (Bl. Com., p. 134), their infringement is discussed in part in this language: "The security of his reputation or good name from the acts of detraction and slander are rights to which every man is entitled by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right." In volume 2, p. 118, Bl. Com. (Cooley), under the head of "Injuries Affecting Personal Security," he says: "As to injuries which affect the personal security of individuals, they are either injuries against their lives, their limbs, their body, their health, or their reputation." All these, as is each of them, are injuries to the person. The act of Congress must be understood as having used the words in the section quoted with reference to their common-law acceptation. Sutherland on Statutory Construction, 289. An injury to one's person may be done in a number of ways. For example, it may be done to some member

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of his body, it may be to his health, it may be to his sense of feeling, it may be to his state or peace of mind. Any injury done to him that wounds him in any of these parts is essentially a personal injury—that is, an injury to his person; an injury to that which constitutes a part of his person. The law may not allow a recovery for all such injuries, but for such as it does allow a recovery for it may be classed generally as a recovery for a personal injury. As was said by the Supreme Court of Rhode Island in McDonald v. Brown, 51 Atl., 213, 58 L. R. A., 768: "Wounded feelings, mental anguish, loss of social position and standing, personal mortification, and dishonor are clearly injuries that pertain to the person. In so far as we are aware, injuries to the character are always classed in the law with injuries to the person." In Colwell v. Tinker, 169 N. Y., 531, 62 N. E., 668, 58 L. R. A., 765, it was held that criminal conversation with the wife is a personal injury to the husband, without regard to the statutory declarations to that effect, in New York. This was in a proceeding for a discharge under the section of the bankruptcy act quoted. As touching the intent and spirit of the bankrupt laws, that court well said: "The policy of the bankrupt law is to discharge the honest and unfortunate debtor from his contract obligations, and not to free him from judgments involving his fraud, which implies moral turpitude or intentional wrong, or judgments for willful and malicious injuries to the person or property of another." In the case of Re Freche (D. C.), 109 Fed., 620, decided in June, 1901, Judge Kirkpatrick, of the United States District Court, held that a judgment based upon a criminal conversation with the daughter of the judgment creditor was not one for which a bankrupt could be discharged under the section quoted. In summing up the elements constituting the rights

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of the plaintiff, the father of the seduced girl, to recover in that case, the learned judge said: "Therefore, upon the foundation of loss of services, there has been built up a right of the parent to recover in such action damages for the personal injuries upon him by the act of seduction, and to receive compensation for being thereby subjected to mental anguish, anxiety, permanent sorrow, dishonor, and disgrace. The jury is entitled to consider all these injuries in assessing the plaintiff's damages. In this respect the injury is to the person of the plaintiff, and the damages recovered are analogous to those in an action of slander or libel."

Appellant cites sections 83 and 74 of the Civil Code of Practice of Kentucky as indicating a legislative differentiation existing in this State regarding those personal injuries which appertain to the members of the person and those which affect only the character. Section 83 of the Civil Code deals with those civil actions which may be joined in one suit. It provides: "(5) For injuries to character; (6) for injuries to person and property." Section 74 of the Civil Code of Practice, concerning the venue of actions, provides: "Every other action for an injury to the person of the plaintiff, and every action for an injury to the character of the plaintiff, against a defendant residing in this State, must be brought in the county in which the defendant resides, or in which the injury is done." It was, of course, competent for the Legislature to provide what actions might be joined in one suit. All actions affecting real property may not be joined under that section; as, for example, an action upon a contract, express or implied, concerning real property, and an action for the recovery of real property. Yet this does not argue at all that both actions may not affect the rights of property. It may be, too, that

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the Legislature might have omitted from section 74 the words, "and every action for an injury to the character of the plaintiff," as they were already embraced in the provision of the clause, "action for an injury to the person of the plaintiff." However that may be, as said in Colwell v. Tinker, supra, it was the common-law definition of the term "injuries to persons" that must be looked to in interpreting the act of Congress, rather than the local acts of the several States.

The judgment of the circuit court refusing to discharge appellant is affirmed.

CASE 42--ACTION BY R. L. JOHNSON AND OTHERS AGAINST B. F. CREECH AND OTHERS INVOLVING TITLE TO LAND AND THE TIMBER THEREON.—OCT. 14.

Creech &c., v. Johnson &c.

116 441
120 427

116 441
f137 541

APPEAL FROM BELL CIRCUIT COURT.

JUDGMENT FOR PLAINTIFFS AND DEFENDANTS APPEAL. AFFIRMED.

PATENTS—LOCATION—CALLS—LINES—CORNERS — CONSTRUCTION — DETERMINATION OF BOUNDARY.

Held: 1. Where, in construing the description in a deed, the corners are established, they must control the course and distance.

2 Where the terms of a patent from the State are uncertain or doubtful, it is to be strictly construed against the grantee.

3. Where a call in a State patent to land is for a stake "near Cumberland Gap," the language cannot be construed as meaning in Cumberland Gap.

4. Where a call in a patent from the State placed a certain corner "near Cumberland Gap," but the placing of the corner in accordance with the call would have caused the patent to embrace a town with the county courthouse and public grounds, the word "near" was too indefinite to justify a construction of the patent in accordance therewith, so as to sustain such a result.

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5. Where the calls of a patent were for 664 poles, 8,320 poles, 3,200 poles and 3,150 poles, and one of the calls established a corner "near Cumberland Gap," considering the length of the lines of the patent and the notoriety of Cumberland Gap, the location of a corner within five miles of the gap might be reasonably spoken of as near Cumberland Gap.
6. Where the calls of a patent from the State of Kentucky were such that the patent embraced lands in Tennessee and Virginia, in the absence of marked lines or corners, it was proper to adopt that location of the patent which gave about the quantity of land called for by reversing the lines from the beginning corner.

COOK & JONES, ATTORNEYS FOR APPELLANTS.

This is not the first time the location of patent No. 6975 for 86,000 acres of land to Smith, Skidmore & Ledford has been before the courts.

The same question arose in the case of Davis v. Farmer, pending in the United States Circuit Court for the District of Kentucky in the year 1894, when Judge Barr, in his opinion, held that the "fourth corner of said patent was at or in Cumberland Gap, and that the survey could not legally go beyond the Kentucky line." The same question again arose in the case of Davis' Heirs v. Hinckley in the same court in the year 1900 when Judge Evans held the same.

In the case at bar the circuit court before whom the law and facts were tried repudiates the fixing of the fourth corner *in* Cumberland Gap, giving as a reason for such repudiation that as the word "near" is of equivocal import it ought not to overcome the call for course and distance which fixed the point called for definitely.

Our contention is that the fourth corner of said patent is *in* Cumberland Gap, as held by Judge Barr and Judge Evans, and that the next call of said patent must run its full length of 3,200 poles on the degree north, 15 east; that the surveyor who made the original survey had not authority to go outside, and did not go outside of Kentucky in making the survey, but followed the Kentucky line from the third corner to the center of Cumberland Gap.

We insist that the rules laid down by this court in Pearson v. Baker, 4 Dana, 323, do not apply to this case; that the rule as to contracting or extending the distances must be subordinate at all times to the State lines, and in no event can the lines be extended beyond the boundary of the State of Kentucky.

And we insist, moreover, that the *quantity* of land embraced

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by any particular location of the patent in controversy is not to be considered when it is conceded that the said patent, however located, will not hold more than 86,000 acres that was vacant and unappropriated at the time the survey was made on which the patent was issued.

It seems to us that it would be a useless task to speculate as to the different locations that may be given to said patent if we once depart from the idea that the fourth corner thereof is located *in* Cumberland Gap, and we shall not therefore consume time in noticing the reasoning by which the lower court in its findings arrived at a conclusion which militates against our contention as well as against the former judgment of the court in Asher & Sons v. Howard.

WM. LOW AND W. O. HARRIS, FOR APPELLEE.

The proper location of patent No. 6975 was considered by this court in the case of Asher & Sons v. Howard, and the court refused to fix the location upon the ground that the case had not been sufficiently prepared to enable it to do so.

The contention of the appellants is that the call for a stake at Cumberland Gap fixes Cumberland Gap as the fourth corner and that the proper manner of locating the patent is by running the calls of the patent from that point to the beginning, increasing the length of the fifth and sixth lines to close.

The circuit judge held, upon the authority of Pearson v. Baker and Others, 4 Dana, 328, and the authorities cited therein, that as the patent will not close upon its courses by any method of location unless the distance of the third and fourth lines are contracted, or the distance of the fifth and sixth lines are extended it was proper in the absence of evidence showing in which lines the mistake was made, to contract the third and fourth lines by reversing the patent from the first corner pursuing the courses of the patent to the beginning.

By this method of location the number of acres by the patent in Kentucky (93,552 acres) is nearer to the number called for than by any of the other locations.

By the location adopted by the circuit court the fourth line crosses Cumberland mountain about five miles east of Cumberland Gap. As stated by the circuit judge, the word "near" is an indefinite term, its exact meaning depending upon the circumstances under which it is used.

Such indefinite words of description ought only to be resorted to, in fixing boundaries, in the absence of more definite and exact description. But in this patent the courses and distances

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are given; they fix the location of the corner definitely and show just how near it is to Cumberland Gap. The courses and distances control in the absence of marked lines and corners.

The Federal judges, in their opinions filed with appellants brief, have treated the stake corner, near Cumberland Gap, as a natural object and have, in effect, made the third call of the patent read as follows: "Thence with the State line S. 60, W. 8,320 poles to the State line monument in Cumberland Gap."

For such a change in the calls of the patent there is no warrant of law, and it would do violence to the instrument in several particulars.

1. The State line at this point is not a straight line, but a very crooked one.

2. It does not at any point run south 60 west.

3. To locate the fourth corner at Cumberland Gap, we must travel three and one-fourth miles north from the point fixed for the corner by courses and distances, and to make the survey close we must extend the fifth line 1,858 poles and the closing line 1,840 poles.

4. To locate this corner at Cumberland Gap we must increase the acreage of the patent from 86,000 acres to 182,184 acres.

Surely these are reasons enough why the court should not follow the Federal judges in altering the language of the patent and substituting for it something so wholly different.

The location of a patent is the act of the patentee and not that of the State. If he so locates it as to make his patent void it is his own lookout. There is no warranty in law or morals in a public grant.

Assuming that the fourth corner is what it purports to be—a stake corner—all difficulties disappear.

If we run from the first to the last corner by courses and distances, the patent will contain 113,722 acres in Kentucky. If we reverse and run from the last call to the first it will contain 93,552 acres.

Under these circumstances the rule is to reverse (4 Dana, 323).

If thus located, appellees' seventeen acres will be outside the Ledford patent, and the judgment should be affirmed.

AUTHORITIES.

Patent should be reversed. Asher & Sons v. Howard, 70 S. W., 277, and 72 S. W. R., 1105; Pearson v. Baker and Others, 4 Dana, 328; Thornbury v. Churchill, 4 T. B. Mon., 32; Simpson v. Wells, 26 S. W. Rep., 587; Beckley v. Bryan, Sneed 91;

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Bryan v. Beckley, 5 Litt., 91; Preston's Heirs v. Bomar, 2 Bibb., 493; Am. & Eng. Ency., vol. 4, p. 789, 2d ed.

Course and distance control further call as being near. Harry v. Graham, 1 Dev. & B. L., 76-27 Am. Dec., 226.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

Appellees, on August 21, 1902, obtained from the Commonwealth a patent to fifty acres of land in Bell county. The patent was issued on a survey bearing date of November 6, 1901. They filed this suit against appellants, charging that they had entered upon the land so patented, and cut from it timber of the value of $798.04. They prayed judgment for the specific recovery of the timber and $400 in damages. The defendants pleaded that the patent referred to was void for the reason that none of the land covered by it was vacant or unappropriated at the time of the survey, but that all of it was embraced in a patent for 86,000 acres issued to Ledford, Skidmore & Smith on September 25, 1845, and also by a patent granted to Boyd Dickinson many years ago. The proof on the trial showed that only about seventeen acres of land was vacant when the patent was issued if the patent for 86,000 acres to Ledford, Skidmore & Smith was left out of view, and that the defendants had cut on this seventeen acres timber of the value of $256. The court held, under the evidence, that this seventeen acres was not included in the patent to Ledford, Skidmore & Smith, and was vacant when appellees' patent issued. He therefore gave judgment against appellants for the value of the timber cut, and they have appealed.

The patent to appellees was void if the land was not vacant. There was no attempt to show that the land was covered by any other patent than that of Ledford, Skidmore & Smith, and whether it was included in that patent is the only question to be determined on the appeal. The calls

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of the patent are as follows: "Beginning at Crank's creek, on two beeches and two sugar trees, beginning corner to said Smith's fifteen hundred acre survey; thence S., 70 W., 664 poles, to three beeches, beginning corner to Smith's six hundred acre survey; thence S., 28 W., 400 poles, to a stake on top of the Cumberland Mountains; thence S., 60 W., 8,320 poles, to a stake near Cumberland Gap; thence N., 15 E., 3,200 poles, to a stake; thence N., 55 E., 8,820 poles to a stake; thence S., 5 W., 3,150 poles, to the beginning, with its appurtenances." The beginning corner of the patent on two beeches and two sugar trees on Crank's creek, corner to Smith's 1,500-acre survey, is established and undisputed. So is the second corner, at three beeches, corner to Smith's 600-acre survey; and there is no difficulty as to the stake on the top of the Cumberland Mountains, S., 28 W., 400 poles, from the second corner, although the distances as run on the ground are longer than those called for in the patent, and in running from the first to the second corner there is some variation in the course called for to reach the corner. But the corners, being established, must control the course and distance. The trouble comes with the next call of the patent, "S., 60 W., 8,320 poles, to a stake near Cumberland Gap." If this line is run on the course called for, it strikes out through the States of Virginia and Tennessee and corners in Tennessee three and three-fourths miles south of Cumberland Gap. The State of Kentucky, it can not be presumed, undertook to patent land in Virginia and Tennessee. So, it appears from an exhibit filed in the record the United States Circuit Court held in two cases before it that the course of the patent should be disregarded, and the corner set in Cumberland Gap, the line running with the State line, and following the meanders of the top of the mountain to a stake in the

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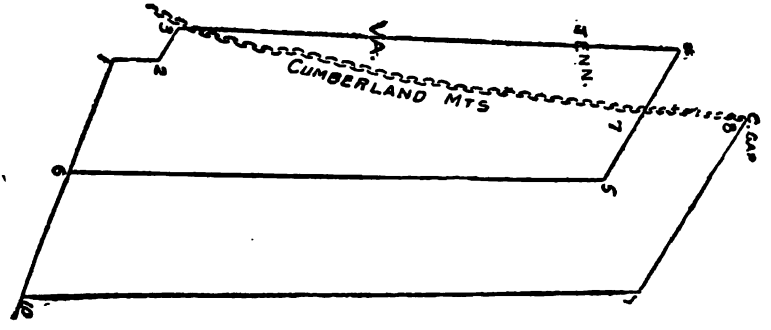
center of Cumberland Gap. If this point be taken as the corner, and the next line is run N., 15 E., 3,200 poles, to a stake, in order to make the patent close, the next line, which calls for 8,820 poles, has to be increased to 9,878 poles, and the sixth line has to be increased from 3,150 poles to 4,990 poles. If the patent is thus run out, it contains in Kentucky 182,184 acres, and will include the land in controversy. But if, instead of thus extending the lines as indicated, we begin at the beginning corner, and reverse the calls of the patent, stopping when we get to the State line, and then following the State line to the third corner, the patent will contain in Kentucky 93,552 acres, and will not include the land in controversy. The situation is roughly shown on the following map, on which the lines 1, 2, 3, 7, 8, 9, 10, 6, 1, indicate the location of the patent on the supposition that the fourth corner is in the center of the Cumberland Gap, and the lines 1, 6, 5, 7, 3, 2, 1, the location of the patent if its calls are reversed from the beginning corner, and the patent is closed by following the State line from the point where it is reached at 7 to the established corner at 3:



The point 7 is about five miles from Cumberland Gap. None of the lines in question have any marks on them. The circuit court accordingly adjudged in favor of the location

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of the patent by reversing its calls from the beginning corner, thus fixing its location as shown by the lines 1, 6, 5, 7, 3, 2, 1, on the map. The defendants appeal.

The only question we deem it necessary to consider is whether this is the correct location of the patent, or whether the fourth corner should have been located in Cumberland Gap, and the other lines run out from that corner as indicated by the lines 8, 9, 10, 1, on the map. In Asher v. Howard, 24 R., 2118, 70 S. W., 277, 72 S. W., 1105, this court declined to determine the proper location of the patent in question because the record was not sufficiently prepared to furnish the court the necessary data. The record before us has been prepared with a view to present the question. In Thornberry v. Churchill, 20 Ky., 29, 16 Am. Dec., 125, the court said: "The order in which the surveyor gave the lines and corners in the certificate of survey is of no importance to find the position of the survey. By reversing the courses is as lawful and persuasive as by following the order in the certificate of survey. The cases adjudged upon that point are conformable to reason and practical utility in guarding against mistakes and destruction of corners by fraud, accident and the elements." Again, in Pearson v. Baker, 34 Ky., 321, the court said: "The beginning corner in the plot or certificate of survey is of no higher dignity or importance than any other corner of the survey. The order in which the surveyor gives the lines and corners in his certificate of survey is of no importance to find the true position of the survey. Reversing the courses is as lawful and persuasive as following the order of the certificate. That construction is to prevail which is most against the party claiming under an uncertain survey. It is his duty to show and establish his corners." In issuing patents the Government acts as trustee for the

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people. The survey is made by the patentee, and the patent is issued on his application. The grant is therefore strictly construed against the grantee where its terms are uncertain or doubtful. 4 Am. & Eng. Ency. of Law, 801. "The calls may be reversed when, by so doing, the quantity of land embraced will more nearly harmonize with that called for in the grant; but the courses and distances, as given in the survey, should be followed when reversing the calls would not have that effect." 4 Am. & Eng. Ency. of Law, 789. "Quantity aids in ascertaining the premises granted when they are not described by known and established boundaries." Id., 790. It will be observed that the two first corners of the tract are corners of Smith's survey, and that all the other corners of the patent are located at stakes. The fact that no timber is called for at any of these corners, and that the distances from the first corner to the second and from the second to the third, when run on the ground, exceed those given in the patent, would seem to indicate that this patent was, perhaps, laid out by protraction, and that the surveyor did not in fact run the lines. But whether this is true or not, there is not enough in the patent to fix the fourth corner in the center of Cumberland Gap. The call of the patent is for a stake near Cumberland Gap. The language would indicate that the stake was not in Cumberland Gap, but near it, for that is a point so well known that it is reasonable the surveyor would have called for a stake in Cumberland Gap if that was in fact the location of the corner. If the corner is located here, it not only makes the patent contain more than 182,000 acres, instead of 86,000 as called for, but it takes in the town of Harlan, with the county courthouse and other public grounds. The word "near" is too indefinite to justify a construction

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of the patent to sustain such a result under the rules above referred to. On the other hand, if we reverse the calls of the patent, it includes about 93,000 acres of land, which is more than the quantity called for, and the fourth corner is located on Cumberland Mountain near Cumberland Gap. Considering the length of the lines of the patent and the notoriety of Cumberland Gap, we are of opinion that the location of the corner within five miles of Cumberland Gap might reasonably be spoken of in the survey as "near Cumberland Gap." It can not be presumed that a grant of 86,000 acres was intended as a grant of 182,000 acres. Nor can it be presumed that the fifth aand sixth lines of the patent were intended to be extended so far beyond the patent calls as would be necessary to close the survey on the supposition that the fourth corner is in Cumberland Gap. The patent calls for the land in Harlan county, Ky. It can not be presumed that it was intended to embrace land in Tennessee or Virginia, or to embrace the county seat of the county where the survey was recorded, or the town about it. In the absence of marked lines or corners or other evidences establishing the proper location of the grant, the circuit court, construing the grant against the grantee where the descriptions are uncertain, properly adopted that location of the patent which gave about the quantity called for, and preserved the courses and distances of the patent calls for the fifth and sixth lines of the survey by reversing the lines from the beginning corner. Harry v. Graham, 27 Am. Dec., 226.

Judgment affirmed.

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CASE 43—ACTION BY H. L. KNOX'S ADMR. AGAINST CITY OF OWENSBORO FOR PERSONAL INJURY TO PLAINTIFF'S INTESTATE.—OCT. 15.

City of Owensboro v. Knox's Admr.

116 451
f122 494

APPEAL FROM DAVIESS CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANTS APPEAL. AFFIRMED.

ELECTRIC PLANT—MUNICIPAL OWNERSHIP—DEFECTIVE APPLIANCE—CARE REQUIRED—NEGLIGENCE—PRIMA FACIE CASE—TRIAL—MISCONDUCT OF COUNSEL—HARMLESS ERROR.

Held: 1. Where a municipal corporation owned and operated an electric light plant, the degree of care required in the maintenance of its wires for the distribution of electricity was not the same as that required with regard to the safe condition of its streets, but it was bound to know whether its appliances were reasonably safe, and to keep them in a reasonably safe condition.

2. Where plaintiff's intestate came in contact with a live electric wire, which conducted an electric current to a short post near a sidewalk, and intestate was injured either by the imperfect insulation of the wire, or by the negligence of the owner of the electric plant in failing to keep other wires from coming in contact with the wire in question, without intestate having any reason to suspect the dangerous condition of the wire, such circumstances establish a prima facie case of negligence.

3. Where, in an action for injuries, the verdict in favor of plaintiff barely compensated him for the injury resulting to his intestate, and was supported by the evidence without regard to the testimony of a particular witness, improper argument of plaintiff's counsel with regard to such witness was harmless.

GEORGE W. JOLLY, ATTORNEY FOR APPELLANT.

This is an action first brought by H. L. Knox by his mother and next friend for injuries received by him in coming in contact with a live wire charged with electricity, by which he was burned, and having since died of natural causes, it was revived in the name of his administrator. He was a colored boy about fifteen years old and resided with his mother. His earning capacity did not exceed $1 per week. He was kept indoors from the burn for about a month. The jury gave him $362.50

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damage, and the court refusing a new trial, this appeal is prosecuted by the city.

The city of Owensboro at the time plaintiff was burned was operating an electric light plant for lighting the city, &c. A guy wire used in suspending one of the arc lights in the city in some way not known became charged with electricity and this boy coming in contact therewith was burned as stated. It was a pure accident, and except as the city is to be held as an insurer, it does not seem possible it can be held liable on general principles of the law of negligence.

Our complaint is:

1. The court erred in its instructions given to the jury and in its failure to give instructions asked by the defendant.

2. The damages given by the jury are excessive.

3. The verdict of the jury is not sustained by sufficient evidence and is contrary to law.

4. Misconduct of counsel, in his argument to the jury, which was excepted to at the time.

5. Error in admitting incompetent evidence.

Our contention is that the city can not be held liable, except as it is proved either that the city itself caused the defect from which the injury resulted, or that it had notice of the existence of the defect in time to have remedied it.

There is no evidence in this case tending to show that the guy wire before the accident was ever charged with electricity even for one minute. There is no evidence of faulty construction or faulty operation. The guy wire was not insulated because it is not used for conveying electricity. How it became charged is not known and is not shown to be the fault of the city.

We submit that under the proof and for the errors mentioned a new trial should be awarded.

J. D. ATCHISON AND C. S. WALKER, ATTORNEYS FOR APPELLEE.

SYNOPSIS, POINTS AND AUTHORITIES.

1. A corporation, private or municipal, operating an electric plant in a city, is required to have and keep safe and properly constructed poles and wires at the places where erected and strung, and in using electricity at such places, must exercise such care as is commensurate with the danger, and employ such skill and knowledge as are ordinarily possessed and exercised by those experienced in the nature of the element, and probable consequences of its application for the purpose it is used, and a failure to have at such places such poles and wires,

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or to use such care, or to employ such skill and knowledge, in consequence of which an injury occurred, is negligence, for which it is liable for the damage sustained. McLaughlin v. Louisville Electric Light Co., 100 Ky., 189-193; Lexington Ry. Co. v. Fain's Admr., 24 Ky. Law Rep., 1443, 1445 and 1446.

2. An infant is not required to exercise more care than his capacity allowed him to exercise under the particular circumstances, and in determining the degree of care he should exercise, the jury should consider his condition and ability, mental and physical, and the particular circumstances under which he is called upon to act. Paducah & Memphis R. R. Co. v. Hoehl, 12 Bush, 48 and 49; Kentucky Hotel Co. v. Camp, 97 Ky., 424; Lexington Ry. Co. v. Fain's Admr., 24 Ky. Law Rep., 1446.

3. Irregularities in arguments of counsel may be cured by the withdrawal of the remarks, or an explanation rendering them harmless, or by the instruction or admonition of the trial court, and a new trial is never ordered in the appellate court, on account of such irregularities, when it appears that the party seeking it was not, under all the circumstances, materially prejudiced, or, in other words, where "the law has been ruled correctly, and the facts authorized the finding of the jury." Ky. Hotel Co. v. Camp, 97 Ky., 431 and 432; Price v. Com. (Ky.), 22 S. W., 157; Duncan v. Com. (Ky.), 16 S. W., 584; Handley v. Com. (Ky.), 24 S. W., 609. A new trial is never granted on account of any statement made by counsel in argument unless it is a flagrant abuse of his right and privilege in presenting his client's cause. City of Covington v. Glennon, 2 Ky. Law Rep., 215 and 216.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

The city of Owensboro owns and operates its own electric light plant, conducted both for public and commercial lighting. Appellee's intestate, a child some fourteen years of age, while passing along one of appellant's streets, inadvertently and innocently came in contact with a guy wire running from the top of a pole, along which were strung the wires for conducting the electric current, to a short post set near the sidewalk. By reason either of imperfect insulation or other improper and neglectful failure to keep the wires from coming in contact, the guy wire

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had become charged with a heavy current of electricity. The child was severely shocked and burned. In this suit to recover damages for appellant's negligence in suffering the guy wire to become in this dangerous condition the court charged the jury as to the law governing this case, which charge is the principal point of objection on this appeal. The verdict was for appellee's intestate, and the city appeals.

The instruction most complained of, and the only one of enough novelty, presumably, to have engaged the serious attention of learned counsel, is this: "The court instructs the jury that defendant was required to have and keep safe and properly constructed wires and poles at the place where plaintiff was injured; and that it was its duty, in using electricity at the place and manner shown in the evidence, to use such care as was commensurate with the danger, and to employ such skill and knowledge as are ordinarily possessed and exercised by those experienced in the nature of the element and probable consequences of its application for the purpose it was used; and that if they believe, from the evidence, the defendant failed to have there such wires and poles or to employ such skill and knowledge, in consequence of which plaintiff was injured, it was negligent, and they should find for the plaintiff." The criticism leveled against this instruction is that it imposes an absolute duty upon the city; whereas, it is argued, the law requires merely, as to keeping the city's streets in a safe condition, that the city shall be liable only if it had notice of the defect a sufficient length of time to remedy it, or might have had such notice by the exercise of reasonable care on the part of its governing officials. This action is not to charge the city for neglecting to keep its streets in safe condition. The city, as a body corporate,

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has become the owner and operator of a plant for the generation and distribution of a most subtle and dangerous agency. The degree of care, prudence, and oversight required of it in the operation of the plant ought to be the same as if it were operated by an individual. The law, in allowing damages for a neglect of such duties, is not primarily to punish the negligent operator, but to protect and to compensate the injured person. If the corporation, whether municipal or private, embarks in a business so menacing to life and safety, it ought to use that degree of care that is commensurate with the danger it creates. It must know whether its appliances are reasonably safe and in order. It will not be allowed to turn loose in a populous community such a deadly agency without first taking every reasonable precaution to prevent its injuring those unawares among whom it is sent, or else it must bear the consequences of such failure. When the circumstances of the injury show that a "live wire"—one charged with a deadly current of electricity—has been allowed to be at a place where the public have a right to be and are, without reason to suspect the dangerous condition of the wire, a *prima facie* case of negligence will have been established. In such a state of case the risk of assuming that the wires and other appliances are in a safe condition is not that of the public, but of the operator of the plant. The operator has the better means of knowing. It is his duty both to provide such appliances as are reasonably safe, and by proper inspection and oversight to keep himself informed as to whether they are safe. Until the public has knowledge or notice to the contrary, they may assume that the operator has properly discharged his duties in these respects. It is not contended that the trial court's instructions placed too high a degree of care upon appellant if it

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had been a private instead of a public corporation. The degree of care required is in conformity to this court's rulings in McLaughlin v. Louisville Electric Light Co., 100 Ky., 189, 18 R., 693, 37 S. W., 851, 34 L. R. A., 812, and Lexington Ry. Co. v. Fain's Adm'r, 24 R., 1443, 71 S. W., 628.

Another objection urged against the verdict is that in the concluding argument to the jury counsel for plaintiff indulged in improper criticisms of one of appellant's witnesses, going so far as to detail an event concerning the witness which was no wise connected with the record. The matter, as used, was improper, but it was of too slight significance to have at all influenced the jury, in any probability. Even if the whole effect of this witness' testimony be eliminated from the record, it could not have affected the verdict. The testimony of this witness went solely to reduce the recovery for a certain feature of suffering after the shock. It tended to show that the suffering complained of was not the result of the shock. Be that so. The verdict of the jury barely compensated for what had gone before. We concur in the trial judge's opinion that the remark of counsel complained of was at most but a harmless error.

Perceiving no error prejudicial to appellant's substantial right, the judgment must be affirmed, with damages.

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CASE 44—ACTION BY LYDIA ROARK AGAINST J. J. C. BACH AND OTHER: INVOLVING TITLE TO A HOMESTEAD.—OCT. 16.

Roark v. Bach &c.

116 457
f136 801

APPEAL FROM PERRY CIRCUT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFF APPEALS. REVERSED.

HOMESTEAD—EXEMPTIONS—DONATION—RIGHT OF OWNER TO CONVEY TO WIFE.

Held: 1. An illegitimate son on the death of his putative father received from decedent's widow and heirs a parcel of land belonging to the estate. The land was worth less than $1,000. The son lived on it with his family. HELD, that the land was a homestead, exempt from the liability of a judgment rendered against him before he acquired it, he not being a purchaser within the meaning of the homestead law making land purchased by a debtor after the creation of the debt liable therefor.

2. A debtor entitled to land as a homestead has the right as against his creditor to give it or its proceeds to his wife.

BAILEY P. WOOTTON AND JESSE MORGAN, FOR APPELLANT.

The evidence in this record shows that L. C. Roark came in possession of a tract of land in the division of his reputed father's estate. Whether he was a legitimate child or not is not material, as he acquired it by reason of his claim as an heir. He traded this piece of land to Hurst for the land in controversy and conveyed the Hurst land to his wife, Lydia Roark. He resided on it with his family, claiming and occupying it as a homestead. It was not worth over $500. Prior to his acquiring the original tract, he owed one Williams a debt, on which he was sued, judgment obtained, and an execution levied on the Hurst land, and it was sold and purchased by Bach.

Our contention is that the land was not subject to sale, but was exempt to the plaintiff, Lydia Roark, and her husband as a homestead.

And being exempt, it was not a fraud in the husband to convey it to his wife, as one has a right to do as he pleases with exempt property so far as his creditors are concerned.

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AUTHORITIES CITED.

Ky. Stats., secs. 1656 and 1659; 91 Ky., 639; 83 Ky., 78; 87 Ky., 511; Morehead v. Morehead, 25 S. W., 750; 42 S. W., 91; Stults v. Sale, 92 Ky., 5; 78 Ky., 630; 92 Ky., 164; Jewel v. Clark, 78 Ky., 398; 1. S. W., 401; Wing v. Hayden, 10 Bush, 276; Thompson v. Huffner's Exr., &c., 11 Bush, 353; Brooks, &c., v. Collins, 11 Bush, 622; 80 Ky., 152; 4 Bush, 51; 1 Bush, 110; 6 R., 458; 7 Bush, 565.

JOHN E. PATRICK AND KELLY KASH, FOR APPELLEES.

The record shows that L. C. Roark, the husband of appellant, was an illegitimate son of J. B. Roark. When it came to partitioning his estate among his heirs this son asserted that he had been adopted as a legal heir, and after a futile effort to establish this fact the widow and children of J. B. Roark had laid off to him a tract of land out of the home farm. Before he acquired this land, he owed a debt to one Williams, who died, and the debt came into the hands of Hagins, his administrator. Roark exchanged a portion of this land to Hurst for the lot in controversy and had the lot conveyed to his wife, Lydia Roark, but the deed was never recorded.

Hagins, administrator of Williams, sued on the note, obtained judgment, sued out an execution, had it levied on the lot and bid it in for himself upon the idea that Roark had taken the title to himself.

After this Hagins transferred his bid to appellees, who paid him its reasonable value, and made improvements on the lot, and this suit was brought to evict them.

Appellant and her husband attempt to avoid the force of their fraud by showing that appellee, Bach, was interested in the exchange of the property and assisted in the negotiations, wrote the deed, and knew the lot was conveyed to appellant. But in this they fail.

We insist that the record is conclusive of the fact that Bach, in good faith, believed that the title had been taken to L. C. Roark. It is at least conclusive that his property paid for it.

It is shown (1) that Roark did not inherit the land he exchanged for this lot; (2) that he created the debt for which this lot was sold before he acquired the land that was exchanged for it; (3) that he retained a homestead in the lands he acquired; that is, that he did not exchange the whole tract, but kept that part where he resided; (4) that the conveyance to his wife was voluntary.

We insist, *first*, that he was not entitled to a homestead in this

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land as against a pre-existing debt; *second*, that appellees having parted with their money upon the faith that he had taken title to this land himself, and they having failed to record the deed showing title in appellant, she is estopped from asserting title to it.

OPINION OF THE COURT BY JUDGE PAYNTER—AFFIRMING.

L. C. Roark, husband of appellant, Lydia Roark, was an illegitimate son of J. B. Roark, and upon the death of the latter, and in an action to settle the estate or partition the land, he claimed that he had been, by proper orders of court, adopted as an heir at law of his putative father. This was denied, and the evidence tends to show that the claim had no foundation in fact. However, the widow and children agreed to and did allot him out of the home farm a parcel of land of less value than $1,000, upon which he lived with his family and claimed it as his homestead. Before he acquired the land he became indebted to one Williams, whose personal representative reduced the claim to judgment, and to pay which the lot in Hazard, Perry county, was sold under execution, and by virtue of which sale appellees claim it. It was sold as the property of L. C. Roark. While he was living on his homestead with his family, he sold or traded part of it to one Hurst, and as part consideration received the lot in controversy. In the exchange of deeds the lot was conveyed to his wife, the appellant, but she did not have her deed recorded before the sale under the execution. The question before us is, did the wife acquire title to the lot? Under the statutes regulating homestead rights, the homestead of L. C. Roark would have been subject to the payment of the debt if he had purchased it after the debt was created. This court, by numerous decisions, has so interpreted the statute. The evident intention of the General Assembly was to prevent

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the debtor from converting money or property which could have been subjected to the payment of a debt into a homestead exempt therefrom. It has been held that when a debtor has acquired by descent or devise property after the creation of a debt, he is entitled to a homestead in it as against the debt. Meador v. Meador, 88 Ky., 217, 10 R., 783, 10 S. W., 651; Jewell v. Clark, 78 Ky., 398; Pendergest v. Heekin, 94 Ky., 384, 15 R., 180, 22 S. W., 605. To so hold is not violative of the letter or spirit of the statute. In such case the creditor has not been prejudiced, because the debtor has not converted any debt paying part of his estate into exempt property. In this case the debtor did not purchase the land. It was given to him by the widow and children of the deceased in consideration that he was the latter's illegimate son. It was not purchased in the meaning of the homestead law; no part of the debtor's estate was converted into it; the creditor was not prejudiced because it was given to him. It would be an exceedingly narrow view to hold that the debtor acquired the land by purchase in contemplation of the statute. Homestead laws should be liberally construed, so as to carry out the purpose of their enactment. We conclude that the debtor was entitled to the land as a homestead when he sold or traded part of it to Hurst. This being true, did he have the right to give it or its proceeds to his wife? We are of the opinion that he had that right. The creditor could not seize and sell it to pay his debt. He could not restrain or interfere with the alienation or sale of it. He had the right to sell it, with or without consideration, regardless of the claim of creditors. Tong, etc., v. Eifort, etc., 80 Ky., 152, 3 R., 647. This court has held that the owner of a homestead can dispose of it by will. It necessarily follows that the husband had the right to give the

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homestead to his wife. If he could give her that, then he could likewise allow her to receive the proceeds. Such act was not prejudicial to the rights of his creditors.

The judgment is reversed for proceedings consistent with this opinion.

CASE 45—ACTION BY ALBERT R. CLARK AGAINST COVINGTON SAWMILL & MFG. CO. TO RECOVER DAMAGES FOR PERSONAL INJURIES.—OCT. 16.

Covington Sawmill and Mfg. Co. v. Clark.

APPEAL FROM KENTON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

MASTER AND SERVANT—PERSONAL INJURIES—SAWMILLS—FELLOW SERVANTS—INSPECTOR—PETITION—ALTERNATIVE AVERMENTS—DEFECTIVE PLEA—CURE BY VERDICT—LIABILITY OF MASTER.

Held: 1. Plaintiff, who was employed in a sawmill in setting the "dogs" in a log to hold it firmly on the saw carriage, was not a fellow servant with one whose duty it was to inspect the logs before they came to the carriage for the purpose of removing spikes driven in the logs for rafting, and if the negligence of such person resulted in the breaking of a saw, injuring plaintiff, he might recover.

2. In an action for injuries received from the breaking of a saw the complaint was not defective for averring in the alternative that defendant was guilty of negligence either in running the saw too rapidly, or because of some iron being in the logs, or because of some defect in the saw, and that defendant was negligent in not remedying the defect in the saw or timber.

3. Though the averments as to the existence of iron in the log, which, on trial, proved to have been the cause of the accident, were meager, the defect was cured by verdict.

4. If a log, the sawing of which broke a saw and injured an employe, had been inspected by the employer's inspector, and he

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failed to exercise such care as is ordinarily exercised by ordinarily careful persons under the same circumstances, and the injury resulted solely from such want of care, plaintiff was entitled to recover.

ROBERTSON & BUCHWALTER, JAS. W. BRYAN AND S. D. ROUSE, ATTORNEYS FOR APPELLANT.

This is an appeal from a judgment of the Kenton Circuit Court, wherein the plaintiff, now appellee, obtained a judgment against the defendant, now appellant, for $5,000, for the loss of a leg, caused by the breaking of a saw in appellant's mill, the appellant being a manufacturer of lumber.

Appellee was an employe of appellant, was one of a sawing crew, and known as a "dog-setter," whose duties consisted in throwing the "dogs," which were hooks or braces, worked by a lever, and which were fastened in the log after it had been put upon the saw carriage, for the purpose of holding it firmly in position as the carriage ran the log into the saw. The saw carriage consisted of a platform —— feet long and —— feet wide, along the top of which, lengthwise, was a large spiral or spring, the purpose of which was to draw the carriage back after it had run through the saw. The proper movement of the "dog-setter" was to step over this spring, set his "dogs" with the lever, and then step back toward the outside of the carriage and over the spring, remaining outside the spring while the carriage was moving the log through the saw. The appellants operated a belt or band saw on pulleys one above the other.

The logs, which were being used in the mill at the time the injury happened, were river logs, brought in rafts from West Virginia and the Big Sandy, down the Ohio River. Such logs are cut on the hill sides, and in the fastnesses of the mountains, dragged down by means of ropes or chains fastened to spikes or staples driven into the logs, to the creeks and tributaries of the Sandy, rafted at Catlettsburg; the rafts are broken up, and are re-rafted by means of chain-dogs and "ties;" a "chain-dog" is either an old horseshoe or two iron spikes six inches long, connected at one end by a chain consisting of five or six links of ordinary length; a "tie" is a pole eight, ten or twelve feet long. A number of logs are floated evenly together, and these "chain-dogs" are driven into the outside log, fastening down one end of a "tie," which extends across the logs lying in the water, and the other end of the "tie" is fastened down in a similar way. Thus the rafts are made up of the logs in the manner indicated,

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and are floated down the Ohio to the various mills. When the raft reaches the boom of the mill where the logs are to be sawed, the rafts are again broken up by employees of the mill company which is to use them. By the various different movements of the log from the time it is cut on the mountain until the time it reaches the mill, in the manner indicated, a dozen different pieces of iron may have been driven into it, and in moving the logs on the mountain side, floating them to the river through the creeks, making the rafts, breaking them up, rerafting them, catching them when the rafts happen to be broken by storm or flood, and by the various other casualties and incidents which usually happen before a log finally reaches the mill where it is to be sawed, one, two, or sometimes three, four, or five pieces of spikes, tips of "iron-dogs" or other nails, are left in the log, sometimes the end projecting above the surface, but more frequently the iron obstruction is broken off in the log beneath the surface and is invisible to the eye. When the raft is finally broken up at the mill, the men at the river take out all the chain dogs which they see, and cut out all the iron which is visible, or which they know is imbedded in the wood. The logs in appellant's mill are then put upon the car running up the bank from the river to the mill floor, an inspector or "iron-hunter," who for a part of the time has an assistant, goes over the log with a pick, in appearance and size resembling an ordinary ice pick: wherever there is a bruise or scar on the log, or a spike hole visible, the inspector feels for iron with the pick above described, and if he finds any iron it is immediately cut out, before the log is turned over to the saw crew.

It frequently happens after a spike has been broken off in a log, maybe at Catlettsburg, but probably at the headwaters of Sandy, or perhaps in Wolf creek or Pigeon fork, the log remaining in the water the spike hole closes up, or becoming the same color as the surrounding surface of the log is not perceptible or the spike or iron may have been in the tree for years and then the wood has grown around it, and the outside surface does not in even the faintest way reveal its presence. In such cases the log goes to the saw, past the men breaking the raft at the river, past the inspector or "iron-hunter" to the saw, and then when the saw comes into contact with the iron, it may be that the foreign substance is thrown out without damage, it may be that three or four teeth are broken, and it may be that the saw flies into pieces. Sometimes one saw is broken in a log, sometimes two, and even a dozen; again, a saw may not be broken in a week; sometimes a saw strikes an obstruction once in a

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log, and some times three or four times, and again an obstruction may not be encountered for six or eight days.

On the day of the accident the saw struck something, conceded to be a piece of iron, and broke; the jagged, broken end ran under the log, struck Clark's leg and cut it off, and stopped at, or two or three inches from and on, the log side of the shaft or spring elsewhere described.

There were two trials of the case in the court below, the first trial resulting in a verdict for defendant upon the peremptory instruction of the court. The court granted the appellee motion for a new trial, and set aside the verdict and judgment. The second trial resulted as heretofore stated.

BRIEF OF THE ARGUMENT.

The appellant complains:

First, that the court erred in setting aside the verdict rendered at the first trial in the case.

Second, that the verdict on the second trial can not be sustained by the petition in the case.

Third, there was no proof authorizing the case to go to the jury, and in this connection the fellow-servant rule will prevent a recovery.

Fourth, the injury arose from one of the risks of the employment.

Fifth, the court should have given peremptory instruction to find for defendant in the second trial.

Sixth, error of law in the instructions to the jury at the second trial.

AUTHORITIES CITED.

Shearman & Redfield on Negligence, 5th ed., secs. 57, 185, 211; Daniels v. The Met. R. R. Co., L. R., 36, 216; Hayes v. Mich. Cent. R. R. Co., 111 U. S., 228; Phila. R. Co. v. Stebbing, 62 Md., 504; De Graff v. N. Y. Cent. R. R. Co., 7 N. Y., 125; Illinois Cent. R. R. Co. v. Hilliard, 99 Ky., 684; C. & O. R. R. Co. v. Thieman, 96 Ky., 507; Bogenschutz v. Smith, 84 Ky., 330; L. & N. R. R. Co. v. Coppage, 7 Ky. Law Rep., 527; Dean v. Dean's Admr., 8 Ky. Law Rep., 419; Royal Ins. Co. v. Smith, 8 Ky. Law Rep., 521; Thurston v. Davis, 5 Ky. Law Rep., 179; L. & N. R. R. Co. v. Taylor, 92 Ky., 55; Needham v. L. & N. R. R. Co., 85 Ky., 423; Hooper v. Snead Iron Works, 12 Ky. Law Rep., 483; L. & N. R. R. Co. v. Hinder, 16 Ky. Law Rep., 841; L. & N. R. R. Co. v. Vestal, 12 Ky. Law Rep., 1288; Green

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v. Willingham, 8 Am. Neg. Rep., 193; Volz v. C. & O. R. R. Co., 95 Ky., 188; Baxter's Admr. v. Parker, 58 N. Y., 190; Hogan v. Smith, 125 N. Y., 774; Cullom v. Norton, 126 N. Y., 1; Whittaker v. Bent, 167 Mass., 588; Rogers Locomotive Wks. v. Hand, 14 Atl. Rep., 168; Machin v. Boston & A. R. R. Co., 135 Mass., 201; Holden v. Fitchburg R. R., 129 Mass., 268; Kenney v. Hingman Cordage Co., 168 Mass., 279; McAuliffe v. Gale, 11 Am. Neg. Rep., 6; Lamson v. American Axe & Tool Co., 177 Mass., 144; Corrigan v. Washburn & Moen Mfg. Co., 170 Mass., 70; Haley v. Jump River Lumber Co., 81 Wis., 412; R. R. Co. v. Simmons, 21 Ky. Law Rep., 44; Neven v. Sears, 155 Mass., 303; R. R. Co. v. Fitzpatrick, 42 O. S., 318; R. R. Co. v. Webb, 12 O. S., 475.

H. D. GREGORY AND B. F. GRAZIANI, ATTORNEYS FOR APPELLEE.

We contend:

1. The iron-hunter was not a fellow-servant of appellee (dog-setter).

2. It was the duty of the master to furnish sound and safe materials for its servants to work upon.

3. The master is also personally bound from time to time to inspect and examine all instrumentalities furnished by him and to use ordinary care to keep them in good condition.

4 Appellee's petition was good, charging in the alternative that he was injured by the saw running too rapidly, or because of some iron being in the log, or because of some defect in the saw; that one of said causes was true, but which one he was unable to state.

We submit that the evidence in this case shows conclusively that there was iron in the log which was the approximate cause of the breaking of the saw and the injury to plaintiff by cutting off his leg.

And that the master permitted the work to be done at the time plaintiff was injured so rapidly that the inspector or iron-hunter did not and could not locate the iron in the logs.

5. The master can not evade his personal duty to furnish his servant sound and safe material by saying that the employe assumed the risk.

6. The instructions given by the court to the jury were proper, and those asked by defendant were properly refused.

AUTHORITIES CITED.

Shearman & Redfield on Negligence, 5th ed., secs. 194, 194a, 185b, 204, 58, 59, 223, 185a, 213 and 186; Black's Law Dictionary,

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p. 760; C. C. C. & St. L. Ry. Co. v. Ward, 45 N. E. Rep., 325; Ill. Cen. Ry. Co. v. Hillard, 99 Ky., 686; L. & N. R. R. Co. v. Collins, 2 Duvall, 117; L. & N. v. Semones, 21 Ky. Law Rep., 444; Neven v. Sears, 155 Mass., 307; Dean v. Dean ,8 Rep., 419; Royal Ins. Co. v. Smith, 8 Rep., 521; McDowell v. Linnville, 6 Rep., 304; L. & N. R. R. v. Taylor, 92 Ky., 55; Huston v. Brush, 66 Vt., 331; Belle of Nelson Distilling Co. v. Riggs, 20 Ky. Rep., 499; L. & N. v. Vestal, 20 Ky., 1290; Ohio Valley Ry. Co. v. McKinley, 16 Rep., 445; Promer v. Milwaukee & C. R. Co., 90 Wis., 215; 63 N. W., 90.

OPINION OF THE COURT BY JUDGE BARKER—AFFIRMING.

The appellee, Albert R. Clark, recovered a judgment in the Kenton circuit court against the appellant, the Covington Sawmill & Manufacturing Company, for the sum of $5,000, as damages for the loss of a leg, caused by the breaking of a saw in appellant's mill. Appellee was in the employ of appellant, occupying the position of "dog setter," whose duties consisted in adjusting the "dogs," which were iron hooks or braces, fastened in the log after it had been put upon the saw carriage for the purpose of holding it firmly in position as the carriage conveyed it to the saw. There is little or no contrariety in the evidence as to how the accident occurred. At the time of the injury a log had been placed upon the carriage, "the dogs" had been set by appellee, and while it was in process of being run through the mill the band saw struck a piece of iron, which was concealed in the log, with such force as to break the saw, which, being rapidly whirled around by the moving machinery, struck appellee, who was standing near by, upon the leg, completely severing that member. It seems that the logs which were being sawed by appellee had been rafted down the Big Sandy and Ohio rivers. Logs in raft are held together by means of ropes and chains fastened to iron spikes or staples driven into them. When

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the raft is broken up for the purpose of manufacturing lumber, it is necessary, for the safety of those engaged in sawing, as well as for the protection of the machinery, that a careful search be made by an inspector, who is called an "iron hunter," in order to locate and remove any iron spikes left in the logs. For this purpose the "iron hunter" goes over the logs with a pick, in appearance and size resembling an ordinary ice pick. Wherever there is a bruise, or scar, or a spike hole visible, the inspector feels with his pick for iron, and, if he finds any, immediately cuts it out, before the log is turned over to the saw crew. It sometimes happens that, after a spike has been broken off in the log, the hole closes over it, under the influence of the water, making its discovery difficult. Should the inspector fail to discover a concealed spike, and the log is put upon the carriage to be sawed, there is always danger of breakage to the saw and to the lives of those in charge. At the time of the accident to appellee the saw struck a piece of iron spike which the inspector had failed to discover, with the result, as said before, of the loss of his leg. Upon the first trial of this case the court gave a peremptory instruction to the jury to find for the defendant. Afterwards, upon motion of appellee, a new trial was awarded, and on the second trial the jury rendered a verdict in favor of appellee, awarding him damages in the sum of $5,000, of which the appellant now complains.

The peremptory instruction given by the trial judge was evidently based upon the theory that the "iron hunter" and the "dog setter" were fellow servants. Upon a reconsideration of this proposition, however, he seems to have changed his opinion, and consequently awarded appellee a new trial. The "iron hunter," or inspector, was not a fellow servant with appellee in the sense that precludes the latter recov-

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ering damages from their common employer for the negligence of the former. Shearman & Redfield, in their work on the Law of Negligence (5th Ed.) section 194, say: "The master personally owes to his servants the duty of using ordinary care and diligence to provide for their use reasonably safe instrumentalities of service. Among these are a reasonably safe place in which to do their work or to stay while waiting orders, reasonably safe ways of entrance and departure, an adequate supply of sound and safe materials, implements, and accommodations, with such other appliances as may reasonably be required to insure their safety while at their work or passing over his premises to or from their work. These things must, moreover, be adapted to the work in hand. It is not enough that they should be good under ordinary conditions. They must be suitable to the work to which they are applied by the master, and properly adjusted to each other. If, therefore, the master knows, or could have known if he had used ordinary care to ascertain the facts, that the buildings, ways, machinery, tools, or materials which he provides for the use of his servants are unsafe, and a servant, without contributory fault, suffers injury thereby, the master is liable therefor; although he is not thus liable in the absence of actual or constructive notice. The master is not entitled to time to discover defects in things which are defective when put in use. He can not evade his responsibility in these respects by simply giving general orders that servants shall examine for themselves, before using the place, materials, etc., furnished by him. . . . ." Section 194a: "The master is also personally bound from time to time to inspect and examine all instrumentalities furnished by him, and to use ordinary care, diligence, and skill to keep them in good and safe condition. The duty

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of inspection is affirmative, and must be continuously fulfilled and positively performed. Such duty is not discharged by giving directions for its performance, or by promulgating rules requiring it to be performed, or by employing competent and careful persons for that purpose. . . ." Section 204: "None of the duties which have been previously stated as devolving upon the master personally can be by him delegated to any agent, so as to relieve him from personal responsibility. He may, and often must, delegate the performance of such duties to subordinates; but he remains responsible to all his servants for the acts of these subordinates in that particular capacity, to the same extent as if those acts were literally his own. This has been repeatedly adjudged as to his duty in the selection and dismissal of servants, in providing, inspecting, and repairing materials and appliances, in warning servants of special dangers, and in framing rules." The same doctrine is held in an admirably reasoned opinion in the case of Neveu v. Sears, 155 Mass., 303, 29 N. E., 472. In that case the plaintiff was engaged in building for the defendant a wall, using large blocks of granite furnished by the latter, and which had been quarried by the use of dynamite. On the occasion of the plaintiff's injury, a dynamite cartridge, by oversight, had been left buried in a block of the granite, and the plaintiff, in preparing it for use in the wall, struck it with a hammer, whereby the cartridge was exploded, seriously injuring him. The court said: "We see no error in the instructions given to the jury, and they sufficiently cover the requests asked by the defendant, so far as those requests were correct in principle. All the things which it was necessary for the plaintiff to establish were stated, and the rules which define the defendant's duty to the plaintiff were correctly given. The defendant must be

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charged with knowledge of those facts as to the use of dynamite in his quarry which he either knew or ought to have known. Gilman v. Eastern Railroad Co., 13 Allen, 433, 440, 90 Am. Dec., 210; French v. Vining, 102 Mass., 132, 137, 3 Am. Rep., 440; Commonwealth v. Pierce, 138 Mass., 165, 179, 180. His employment of competent quarrymen, and his furnishing them with proper means of preventing any dangers consequent upon the use of dynamite, would not justify him in relying upon an actual want of knowledge that there had been carelessness at the quarry as an excuse for furnishing dangerous stone for the plaintiff's use, if, knowing all that had happened at the quarry, he would then have had reason to believe that unexploded cartridges might remain in the blocks removed to the storage ground and in the stones split from them." In the case of Louisville & Nashville Railroad Company v. Semones, 21 R., 444, 51 S. W., 612, which was an action for personal injury by a servant against his employer, the following instruction, given by the court below, was approved by this court:: "The court instructs the jury that it was the duty of the defendant to furnish the plaintiff and his co-laborers, who were then and there engaged with him in putting the timber in the trestle at washout No. 1, with timber suitable to be handled by its employes, and to use reasonable care to see that it was free from such defects as would make the handling of the same, with ordinary care, free from danger; and if they believe from the evidence that the defendant, its agents and servants then in charge of said work, knew, or by the exercise of ordinary care could have known, that the timber which was put in said trestle was in such a defective and dangerous condition as to make its handling by the plaintiff hazardous and dangerous, and that the injury to the plaintiff was

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caused by the failure of the defendant to furnish timber reasonably free from such defects as would make the handling of same reasonably safe, considering the circumstances under which it was being handled, the law is for the plaintiff. . . ." In the case at bar the employer knew that the logs furnished by it to its employes were liable to have concealed in them iron spikes, the existence of which made their handling during the process of being sawed extremely hazardous, and, recognizing this danger, it employed an inspector, whose duty it was to examine the logs carefully, so as to discover and remove these elements of danger. This inspector was not a fellow servant, within the technical rule, of the sawyers. He was a vice principal, discharging for the master the high duty of furnishing to the other servants safe material upon which to work. The master could not evade its responsibility by delegating the discharge of this duty to a competent servant. It was the duty of the employer to use ordinary diligence to make the logs reasonably safe for the use of the sawyers. When it delegated this duty to an inspector, it was his duty to exercise reasonable diligence to discover and remove any iron spikes, which might be concealed in the logs. This proposition is clearly within the pale of the authorities we have cited to sustain it, and we feel that it is consistent with both reason and justice.

Appellant further claims that the petition is defective, and will not support the verdict. The petition, after setting out in detail the facts of appellee's employment and duties, says that: "While in the discharge of his duty on or about the 31st of May, 1900, the defendant, with gross negligence, caused said saw either to run too rapidly in said log or timber, or because of some iron being in said log or timber, or because of some defect in said saw—one of

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these said causes being true, but which one the plaintiff is unable to state—said saw suddenly twisted, bent and broke, and ran through said log in a direction opposite to where it was intended, striking the plaintiff in the leg, and cutting the same off. The plaintiff charges the defendant with gross negligence in not properly remedying the defect either in said saw or in the timber, or in the manner in which said sawing was done; that all of said defects were unknown, to the plaintiff, but were known, or could have been known by the use of ordinary care, by the defendant." Appellee had the right to allege the causes of his injury in the alternative, as he did. Upon the trial it developed that the cause of his injury was the existence of iron in the log he was sawing, so that, for the purposes of the trial, the petition should be read leaving out the other alternative allegations. When so read, undoubtedly the allegations of the cause of the injury are exceedingly brief, if not scant and meager. While the pleading is certainly very inartistically drawn, we think that its defects were cured by the verdict. Newman, in his work on Pleading and Practice (page 739), thus declares the rule on this subject: "The verdict will not aid a defective allegation, but it extends sometimes even to cure an omission altogether to make a necessary allegation. Where there are defects or imperfections in the pleading, yet the issue raised is such as necessarily requires on the trial the proof of the facts defectively or imperfectly stated, or even omitted, and without which it is not reasonable to presume that the jury would have given a verdict for the party, such deficiency is cured by the verdict." The evidence in this case, under principles which we deem sound, was sufficient to warrant the submission of the question of negligence to the jury. Whether or not the inspector could, by the exer-

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cise of ordinary diligence, have discovered the iron which caused the injury, was the province of the jury to determine; and, as they determined it adversely to appellant, it only remains to ascertain whether or not the law was properly given by the court.

Instruction No. 1, which is the only one complained of, is as follows: "If the jury believe from all the evidence that the log upon the carriage at the time of the injury to plaintiff, and mentioned in the proof, was, immediately before it was placed upon said carriage, inspected or examined by an employe of defendant company, known as an 'inspector' or 'iron hunter,' and if the jury believe that in making said inspection or examination the inspector or 'iron hunter' failed to exercise such care as is ordinarily exercised by ordinarily careful and prudent persons under the same or similar circumstances, and in the same or similar business, and that the injury to plaintiff resulted solely from said failure of said inspector or 'iron hunter,' and that the plaintiff, at the time and place of the said injury, and in the discharge of his duties, exercised such care as is ordinarily exercised by ordinarily careful and prudent persons under the same or similar circumstances, and in the same or similar business, then the jury should find a verdict for the plaintiff; otherwise the jury should find a verdict for the defendant." This is in harmony with the authorities we have cited, and seems to us to fully state the law governing this case. It does not make the employer insure the safety of the employe, but only holds it to the exercise of ordinary diligence in supplying reasonably safe material for the use of the latter, which, as said before is consonant with both reason and justice.

The judgment is affirmed.

Petition for rehearing by appellant overruled.

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CASE 46—ACTION BY ANDREW DEUSCH AGAINST ADELAIDE QUESTA AND OTHERS TO RECOVER LAND.—OCT. 20.

Deusch &c. v. Questa &c.

APPEAL FROM KENTON CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFFS APPEAL. AFFIRMED.

HUSBAND AND WIFE—MORTGAGE BY WIFE—HUSBAND NOT JOINING—JUDGMENT AGAINST WIFE—BINDING ON WIFE—EFFECT ON HEIRS—ESTOPPEL.

Held: 1. Under Kentucky Statutes, section 2128, authorizing a married woman to make contracts as though she was single, except that she may not mortgage her real estate without joinder of her husband, a married woman's mortgage of her real estate in which her husband did not join is void.

2. Under Kentucky Statutes, section 2128, providing that a married woman may sue and be sued as a single woman, a judgment against a married woman alone, in an action to foreclose a mortgage given by her in which her husband did not join as required by said section, is binding on her and her heirs.

3. The children of the wife take only such rights as she had, and they are likewise bound by the judgment against her.

4. In conferring upon married women the power to sue and be sued alone, the Legislature relieved them from the power of their husbands in all actions, and the estoppel of a judgment operates upon them in all cases as though they were unmarried.

HALL & McLEAN, ATTORNEYS FOR APPELLANTS.

Before the enactment of the Married Woman's Act of 1894, Christina Deusch, then a married woman, executed a note to George Bright for $4,500, and a mortgage to secure same. Her husband signed neither the note nor the mortgage. After the enactment of said act, suit was filed against her alone on said note and mortgage, in which personal judgment was taken against her, a lien declared in favor of plaintiff and the mortgaged property sold to pay same, and was purchased by plaintiff in said suit and sold and conveyed to the appellees herein.

Christina Deusch then died leaving a husband and appellants—her children. After the death of her husband, the children (ap-

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pellants herein) brought this suit seeking a judgment declaring the judgment and all steps taken thereunder void, and declaring appellants to be the owners of the property sold under the mortgage and requiring an accounting of rents, etc.

The court sustained a demurrer to the petition, and plaintiffs declining to plead further, their petition was dismissed and they appealed.

The only ground for contending that the title of Mrs. Deusch passed by reason of this mortgage, judgment and sale, is that she is estopped by failure to appear and plead to the suit.

Married women can often be estopped by their acts, but it is a rule of universal application that *a married woman can not do by estoppel what she can not do directly.* Otherwise, she could, by her own act, enlarge her rights and privileges by avoiding the limitations placed upon them.

The mortgage being void before the act of 1894, continued to be void after the passage of said act. Said act did not enlarge her right to convey or mortgage her real estate without joining her husband therein, and we contend that if the mortgage was not made valid by the act of 1894, the petition was good on demurrer.

AUTHORITIES CITED.

Bohannon v. Travis, 14 R., 912; Robinson v. Robinson, 11 Bush, 174; Am. & Eng. Ency. of Law, vol. 14, p. 637; Ogels by Coal Co. v. Pasco, 79 Ill., 164; Bigelow on Torts, p. 600; Glidden v. Strupler, 52 Pa. St., 400; Powell's Appeal, 98 Pa. St., 403; Towles v. Fisher, 77 N. Car., 437; Mason v. Jordan, 13 R. I., 193; Doyle v. Kelly, 75 Ill., 574; Graham v. Long, 65 Pa. St., 383; Wood, &c., v. Terry, &c., 30 Ark., 385; Morrison v. Wilson, 13 Cal., 494; Bahler v. Weyburn, 59 Ind., 143; Lowell v. Daniels, 2 Gray, 161 (Mass.); Todd v. The Pittsburg, Ft. Wayne & Chi. Ry. Co., 19 O. St., 514; Connolly v. Branstter, 3 Bush, 702; Craddock v. Tyler, 3 Bush, 361; Heck v. Fisher, 78 Ky., 643; Newman v. Moore, 94 Ky., 147; Bull v. Sevier, 88 Ky., 515; Holloway v. Louisville, &c., Ry. Co., 92 Ky., 244; Rusk v. Tenton, 14 Bush, 490; Fitter v. Wilson, 12 B. Mon., 90; Louisville Ry. Co. v. Stephens, 96 Ky., 401; Passmere v. Eastin's Admr., 90 Ky., 381; Webster v. Tattershall, 18 R., 439; Burnett v. Shackelford, 6 J. J. Mar.; Smith v. Shackelford, 9 Dana, 452.

ERNST, CASSATT AND McDOUGALL, ATTORNEYS FOR APPELLEES.

The judgment which is attacked in this action was rendered in a court which had the jurisdiction of the person of the de-

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fendant and the subject-matter of the action, and in an action instituted at a time when it was the privilege of Christina Deusch to sue and be sued as a feme sole; and as a necessary consequence, her duty when she was sued was to make any defense which she had or had knowledge of, or be forever estopped by the judgment of the court.

We contend that that judgment not having been appealed from and being in full force and effect, is conclusive against Christina Deusch or any one claiming under her, and can not be collaterally attacked.

We contend:

1. This collateral attack on the judgment can not be maintained.

(2) There are two recent decisions of this court directly in point, viz.: Wren v. Ficklin, 22 R., 1035 (109 Ky., 472); Turner v. Gill, 20 R., 1253 (105 Ky., 414).

3. These Kentucky cases are fully supported by the text writers and the courts of other States, viz.: Freeman on Judgments, sec. 150; Watson v. Camper, 119 Ind., 60; Hartman v. Ogburn, 54 Pa. St., 120.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

Christina Deusch, in the year 1890, executed a mortgage to Georgia D. Bright on certain land in Covington to secure a debt of $4,500, her husband not joining in the mortgage. On July 15, 1895, Bright filed suit against her, and on November 20, 1898, recovered a personal judgment for the debt; also an order for the sale of the property to pay the debt. The sale was made under the judgment. The land was purchased by the plaintiff, the sale was confirmed, and the land was conveyed to her. Thereafter she sold and conveyed the property to appellee Adelaide Questa, who has since held it. Mrs. Deusch's husband was not a party to the suit. Some time after this she died, and also her husband. This action was begun on February 4, 1901, by her heirs at law, to recover the property from Mrs. Questa on the ground that the mortgage, judgment, sale, and all proceedings thereunder were void.

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As the husband of Mrs. Deusch did not join in the mortgage, it was void, and, if no judgment had been rendered upon it, it could not be enforced. The question to be determined is whether the same rule applies to the judgment rendered against her since the act of March 15, 1894, which is now embraced in sections 2127-2148, Kentucky Statutes, 1899, because the husband was not a party to the proceedings. By this act it is provided: "A married woman may take, acquire and hold property, real and personal, by gift, devise or descent, or by purchase, and she may, in her own name as if she were unmarried, sell and dispose of her personal property. She may make contracts and sue and be sued as a single woman ,except that she may not make any executory contract to sell or convey or mortgage her real estate, unless her husband join in such contract." Section 2128. "Husband and wife may sell and convey her land and chattels real, but the conveyance must be acknowledged and recorded in the manner required in the chapter on conveyances." Section 2129. Since this statute was passed it has been held by this court that a married woman, having power to sue and be sued as though she were single, is bound by judgments against her as other litigants. Turner v. Gill, 105 Ky., 414, 20 R., 1253, 49 S. W., 311; Wren v. Ficklen, 109 Ky., 472, 22 R., 1035, 59 S. W., 746; Howard v. Gibson, 22 R., 1294, 60 S. W., 491; Shanklin v. Moody, 23 R., 2063, 66 S. W., 502. It is insisted, however, for appellants, that by the statute the wife can not sell or convey or mortgage her land unless her husband joins with her, and that to permit her to be bound by a judgment in a case to which he is not a party is to allow her to accomplish by indirection what she can not do directly; and in support of this we are referred to a number of authorities to the effect that a married woman can not do by estoppel what

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she can not do by direct contract. There is some conflict in the authorities as to how far a married woman may be estopped by her conduct (15 Am. & Eng. Ency. of Law, 799, 800), but we do not think it necessary here to consider this question. In 24 Am. & Eng. Ency. of Law, 746, it is said: "As a general rule, at common law a married woman can neither sue nor be sued alone, but she must sue or be sued in connection with her husband, and therefore, to render a judgment conclusive upon her, it is necessary that her husband should have been joined in the suit. By statute, however, in most jurisdictions, the common-law rule has been much modified, and in some jurisdictions the disability of married women in this respect has been removed. Where her disability has thus been removed, she will be concluded by a judgment in a suit in which she sued or was sued without the joinder of her husband." It is the purpose of our statute to enlarge the rights of married women, and among the rights conferred upon her is the right to sue and be sued as a single woman. The right to sue and be sued as a single woman necessarily carries with it the right to sue or be sued alone, and without the joinder of her husband. The exception in the act that she may not make any executory contract to sell or convey or mortgage her real estate is not a limitation upon her right to sue and be sued as a single woman, but upon her power to contract. By section 2132, Kentucky Statutes, 1899, after the death of either husband or wife the survivor shall have an estate for life in one-third of the real estate of which the deceased spouse was seized in fee during coverture, unless the right thereto has been barred or relinquished. Where the husband is not a party to the suit, his rights under this section are not affected by the judgment; but, as she has the power to sue and be sued as a single woman, she is

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bound as other litigants by a judgment against her. And appellants, who are the children of the wife, take only such rights as she had, as they claim under her. To hold otherwise would be to deny the statute its natural effect, and to make it mean that she may sue and be sued as a single woman only in a certain class of actions. This is not the meaning of the Legislature. It has conferred upon married women the right in all actions to sue and be sued as single women. The purpose is to relieve them from the disability of coverture in so far as they could not sue or be sued alone. In conferring upon married women the power to employ counsel and control their own lawsuits, the Legislature had in mind relieving them from the power of their husbands in this particular, and, this being the case, the estoppel of the judgment operates upon them in all cases as though they were unmarried.

Judgment affirmed.

CASE 47—ACTION BY CINCINNATI, N. O. & T. P. RY. CO. v. M. S. BAUGHMAN TO RECOVER THE POSSESSION OF A CAR.—OCT. 20.

Cincinnati, N. O. & T. P. Ry. Co. v. Baughman.

APPEAL FROM LINCOLN CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

HIGHWAYS—OBSTRUCTION—FINES—COURTS—JURISDICTION — STATUTES —REPEAL—MUNICIPAL CORPORATIONS—SPECIAL ACT—NONUSER.

Held: 1. Kentucky Statutes, 1899, section 4335, declares that any person who shall wilfully obstruct a public road shall be fined for each offense not less than five dollars nor more than fifty dollars, to be recovered in like manner as fines against contractors, and shall be liable for damages, to be recovered in any court having jurisdiction of the amount claimed. Section 4316 confers

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on the quarterly court exclusive jurisdiction of all breaches of contractor's bonds. HELD, that the words "to be recovered in like manner as fines against contractors" in section 4335 had reference merely to the method of procedure, and that such sections did not impliedly repeal sections 1093 and 1141, conferring jurisdiction on justices of the peace to try the offense of wilfully obstructing a public road.

2. Where a city failed for more than seventeen years to exercise any of the governmental functions granted to it by an act of incorporation, the rights and powers thereby granted were forfeited by nonuser.

J. W. ALCORN AND JOHN GALVIN, FOR APPELLANT.

The only question involved in this case is whether or not under section 4335, Kentucky Statutes, a justice of the peace has jurisdiction of prosecution for the offenses therein prescribed, one of which is that of wilfully obstructing a public road.

Appellant contends that the statute confers upon the judge of the quarterly court *exclusive* and original jurisdiction of prosecutions for these offenses, and that a justice has no jurisdiction thereof. That part of said statute, section 4335, which relates to prosecutions for the recovery of the penalty which it prescribes, is as follows:

"Any person who shall wilfully obstruct, injure or destroy any of said public roads or bridges, any index or finger board, or any culvert or ditch on said roads, or shall wilfully injure any of the tools or implements, or who shall without right, take possession of or use or appropriate the same shall be fined not less than five nor more than fifty dollars, *to be recovered in like manner as fines against contractors.*"

Section 4316 prescribes the manner of proceeding for the recovery of fines against contractors: "For any breach of a contractor's bond he shall be liable to a fine of from $10 to $100. . . . Upon the filing of the report of the superviser or overseer, that any contractor has failed to comply with his contract, or upon *information or oath of any person*, or of his own knowledge that any road or bridge embraced in said contract is out of repair, the *judge of the quarterly court of said county shall forthwith issue from and make returnable to his court a warrant in the name of the Commonwealth against the delinquent contractor, and when executed, proceed forthwith to try the same as other Commonwealth warrants are tried.*"

We submit that the language of this section plainly designates the quarterly court as the forum, and the only forum upon which is conferred jurisdiction of prosecutions for violations of con-

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tractor's bond. There is nothing in the wording of any part of the section or of the chapter of which it is a part, which, even by remote implication, confers upon any other tribunal, original jurisdiction of the offenses for which the penalty is therein prescribed.

And as section 4335 provides that the penalties for the offenses therein named are to be recovered "in like manner as fines against contractors," our contention is that the quarterly court is the only court which has jurisdiction of prosecutions for the recovery of such fines, and therefore a judgment of conviction of that offense by the court of a justice of the peace is a nullity.

H. HELM AND P. M. McROBERTS, FOR APPELLEE.

Under section 1093, Kentucky Statutes, a justice of the peace has jurisdiction of all penal offenses, the punishment of which is limited to a fine not exceeding $100, or imprisonment not exceeding fifty days; therefore he had jurisdiction of this case unless it had been expressly taken away, which has not been done. Ky. Stats., secs. 4316, 4335, 1050, 1093; 20 Ky. Law Rep., 606.

OPINION BY CHIEF JUSTICE BURNAM—AFFIRMING.

The appellant, the Cincinnati, New Orleans & Texas Pacific Railway Company, sued the appellee, M. S. Baughman, to recover the possession of a car which it claimed to be the owner of and entitled to the possession. The appellee for answer admitted that he had the car in his possession, as sheriff of Lincoln county, by virtue of the levy thereon of eight executions issued by J. A. Singleton, a justice of the peace of Lincoln county, in favor of the Commonwealth of Kentucky and against appellant for $50 each. For reply the appellant pleaded that the executions under which the appellee took and held possession of the car were void because a justice of the peace had no jurisdiction of the offense so charged; that the judgments rendered by him were void; that the executions, being issued on void judgments, afforded appellee no justification as sheriff for

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his act in seizing the car sued for; that the acts for which the warrants were issued, and upon which the judgments were rendered, were committed in the corporate limits of Tunnel City, a town incorporated by a special act of the General Assembly, approved March 20, 1878 (2 Acts 1878, p. 47, c. 590); and that for this additional reason the justice of the peace who tried the case had no jurisdiction of the offense. The appellee rejoined, admitting the passage of the act of March 20, 1878, incorporating Tunnel City, and that the offenses charged in the warrants, and upon which the judgments were rendered, were committed within the territorial limits designated by the act, and pleaded that for a period of more than seventeen years none of the rights and powers granted by the act had been exercised, and were forfeited by nonuser. He further pleaded that the obstructed road was established, worked, and maintained within the so-called city as one of the public roads of the county, under an overseer appointed by the county court. The circuit judge dismissed appellant's petition, and it has appealed.

The main ground relied on for reversal is that section 4335, Kentucky Statutes, 1899, which is a section of the act of March 10, 1894, repeals by implications so much of sections 1093 and 1141 of the Kentucky Statutes (1899) as confers jurisdiction upon justices of the peace to try the offense of willfully obstructing a public road. Section 4335 reads as follows: "Any person who shall willfully obstruct, injure or destroy any of said public roads . . . shall be fined for each offense not less than five nor more than fifty dollars to be recovered in like manner as fines against contractors, and shall also be liable in a civil action for double damages to the county or person aggrieved or injured, to be recovered in any court in the county having

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jurisdiction of the amount claimed. It shall be the duty of the supervisor or overseer and his assistants, and of all constables, town marshals and sheriffs to report promptly to the county judge or some justice of the peace all violations of this act." The words "to be recovered in like manner as fines against contractors" are relied on as conferring exclusive jurisdiction for the punishment of the offense upon the quarterly court, for the reason that section 4316 confers upon the quarterly court exclusive jurisdiction of all breaches of contractors' bonds; and, as section 4335 provides that the offense of obstructing a public road is to be recovered in like manner as fines against contractors, it is argued that the quarterly court alone has jurisdiction of prosecution for the recovery of such fines. Neither section 4316 nor section 4335 contains any express repeal of the jurisdiction theretofore enjoyed by justices of the peace to try misdemeanors of this character, and courts are always slow to favor repeals by implication. It is provided in section 4316 that "upon the filing of the report of the supervisor or overseer that any contractor has failed to comply with his contract, or upon information or oath of any person or on his own knowledge that any road or bridge embraced in said contract is out of repair, the judge of the quarterly court of said county shall forthwith issue from and make returnable to his court a warrant in the name of the Commonwealth against the delinquent contractor, and when executed, proceed forthwith to try the same as other Commonwealth warrants are tried." In our opinion, the words "to be recovered in like manner as offenses against contractors" simply refer to the method of procedure; that it must be by warrant, in the name of the Commonwealth, and by trial by jury. If the General Assembly had intended to confer exclusive jurisdiction upon

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the quarterly court to try the offense of wilfully obstructing a public road, there is no reason why they should not have done so in express words. Nor is the necessity of such jurisdiction apparent, as in the case of a violation of the provisions of the contractor's bond, or failure of duty by an overseer or supervisor. The law confers upon the county judge the duty of appointing these officers and taking these bonds, and it is apparent why public convenience would best be promoted by conferring upon the quarterly court original jurisdiction for a breach of any of the duties imposed by the statute; but no such reasons apply to the offense of obstructing a public road. On the contrary, public convenience requires that offenders of this sort should be speedily brought to trial.

We are of the opinion that it is conclusively shown that Tunnel City had for more than 17 years failed to exercise any of the governmental functions granted to it by the act of 1878, and that the magistrate in whose district the offense was commited had jurisdiction to try the offender.

Judgment affirmed.

CASE 48—ACTION BY N. K. FOSTER AGAINST THE BOARD OF EDUCATION OF WINCHESTER FOR A MANDAMUS TO ADMIT A PUPIL WITHOUT PAYMENT OF TUITION FEES.—OCT. 21.

Board of Education of City of Winchester v. Foster, &c.

APPEAL FROM CLARK CIRCUIT COURT.

FROM ORDER GRANTING WRIT DEFENDANT APPEALS. REVERSED.

SCHOOLS—NON-RESIDENT CHILDREN—FREE TUITION.

Held: 1. Kentucky Statutes, 1899, section 3588, authorizes cities of the fourth class to establish a system of public schools for the

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benefit of children residing in the city between certain ages and maintain them by a tax levied on the taxpayers of the city; and section 3605 declares that no child of persons residing beyond the city limits shall be admitted to the schools except on payment of tuition. HELD, that free school privileges under such sections were limited to children who were bona fide residents of the city.

2. Where a child of school age, whose parents resided in another State, went to live with her uncle, who was neither her guardian, curator, nor committee, and she was not apprenticed to him, and he had no control over her, and only assumed responsibilities in connection with her care while she resided in his family, or until she arrived at twenty-one years of age, she was not a bona fide resident of the city where her uncle resided, so as to be entitled to free admission to the schools of such city under Kentucky Statutes, 1899, section 3588, limiting the benefit of such schools to bona fide residents.

BECKNER & JOUETT, ATTORNEYS FOR APPELLANT.

The appellee's petition alleges that Gertrude N. Price was an infant within the school age; that her parents resided in the State of Virginia; that she had no guardian, curator or committee residing in this State, and that she is residing with her uncle, N. K. Foster, in Winchester; that he has undertaken to clothe, support and maintain her as a member of his family until she is twenty-one years of age, and that she has agreed, with the consent of her parents, to live with him until she is twenty-one years of age; and upon this allegation he asks a mandamus requiring appellant to admit her to the public schools of Winchester without payment of tuition fees which had been demanded of her.

Under the statutes applicable to fourth class cities, the appellant board has power to admit pupils to said schools "from beyond the limits of the city, and may collect therefrom tuition fees for the benefit of the schools of the city, making deduction of taxes for school purposes on property in said city paid by parents of said children, and no children of persons residing beyond said limits shall be admitted as pupils in any of said schools except on payment of such tuition fees as said board may require." Ky. Stats., sec. 3605.

Gertrude Price is in no sense a resident of Winchester or Kentucky. Mr. Foster is not her guardian. She may leave at any time and he can not restrain her. He admits he has undertaken to educate her, but this he is not doing when he undertakes to force her into the public schools where he lives with-

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out the payment of tuition fees which the plain letter of the law requires. Rogers v. Trustees, 11 R., 935.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

The appellee, N. K. Foster, a resident and taxpayer of the city of Winchester, brought this suit, praying that a writ of mandamus issue requiring the defendant, the Board of Education of the city of Winchester, to admit his coplaintiff, Gertrude N. Price, into the public schools of the city as a pupil without the payment of tuition fees which had been demanded of her by the defendant. In the original petition Gertrude N. Price united as a coplaintiff, and it is alleged, in substance, that she is a niece of N. K. Foster, and has for three years continuously resided with him as a member of his family; that the uncle, N. K. Foster, agreed with her parents, who reside in Virginia, to board, clothe, educate, and treat her as one of his own children so long as she continued a member of his family. In an amended petition it was alleged that the uncle had agreed with the niece that he would clothe, support, and maintain her as a member of his family until she was twenty-one years of age, and as much longer as she desired; and the niece had agreed, with the consent of her parents, to reside with him as a member of his family until she arrived at the age of twenty-one years; and that she now intended to do so, or so long as the uncle continued to reside in the city. The defendant filed a general demurrer to the petition as amended on the ground that it did not state facts sufficient to support a cause of action. The demurrer was overruled, and, declining to plead further, judgment was entered requiring the defendant to admit plaintiff Gertrude N. Price into the public schools of the city of Winchester as a pupil at the public expense without requiring the payment of tuition fees, and the defendant has appealed.

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A determination of the questions raised by the appeal involves the construction of sections 3588 and 3605 of the Kentucky Statutes of 1899, provisions in the charter of cities of the fourth class, to which appellant belongs. By section 3588 appellant is authorized to establish a system of public schools for the benefit of the children residing in the city between the ages of six and twenty years, and to maintain them by a tax levied upon the taxpayers of the city. This section plainly restricts the benefit of such schools to children who are in good faith residents of the city. That such was the purpose of the statute is also shown by section 3605 of the statute, which authorizes the board of education to admit to the schools pupils from beyond the limits of the city upon the payment by them of reasonable tuition fees for the benefit of the schools of the city. The last clause of this section provides "that no child of persons residing beyond the city limits shall be admitted as a pupil in any such schools except on payment of such tuition fees as the board may require." The powers of the board of education in the maintenance and regulation of public schools are limited by the terms of the statute, and there would have been no just ground of complaint if the Legislature had failed to provide for the admission of children residing outside of the city at all, as these schools are maintained by special local taxation for the benefit of the children of persons who are subject to be taxed for their maintenance. And section 3212, Kentucky Statutes, 1899, which is a provision of charters of cities of the second class relating to the maintenance of public schools, contains no provision for the admission of children who are not *bona fide* residents of the city to public schools. In our opinion, the averments of neither the original nor amended petition

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state a good cause of action. It appears by express allegation that the parents of Gertrude Price reside in Virginia. There is no averment that her uncle is her guardian, curator, or committee, or that she has been apprenticed to him, or that he has any control over her; and his assumed responsibilities in connection with her are only to continue so long as she resides in his family, or until she arrives at the age of twenty-one years. But there is no legal obligation upon either to perform this alleged agreement. In Rogers v. Trustees, etc., 11 R., 935; 13 S. W., 587, this court said: "The fact that children outside of the districts are allowed to attend school is not objectionable, because they are required to pay their tuition, and are not allowed to enjoy the benefits resulting alone from the imposition of the tax. They are made to pay, and must be compelled to pay as the act provides." In Inhabitants of Haverhill v. Gale, 103 Mass.,104, under a statute similar to ours, but which did not authorize the admission to the public schools of children whose parents resided beyond the city, it was held that the city was not authorized to open its schools to children whose parents or guardians resided in another State, and, if they did so, no promise of the parents or guardians to pay for tuition could be enforced. In Binde v. Klinge, 30 Mo. App., 285, under a similar statute, it was held that a minor, who was neither an orphan nor apprentice, and whose parents resided without the school district, was not entitled to attend the school, although he had a home, more or less permanent, within the district. In School District No. 1 v. Bragdon, 23 N. H., 507, it was held that children who were sent into a district by their father to reside with an aunt under indentures of apprenticeship, but which were made only for the purpose of sending the children to school, were liable to

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action by the district. In Wheeler v. Burrow, 18 Ind., 14, it was held that parents residing in another State, by sending their children to Indiana for the purpose of procuring an education, did not obtain for them the right of admission in the common schools of the State. In Gardner v. Board of Education, 5 Dak., 259, 38 N. W., 433, it was held that where one who owned a farm, which had been his domicile, took his family to a city for the purpose of taking advantage of its schools, his children did not acquire a residence to entitle them to the privileges of the city schools. In our opinion, the averments of neither the original nor amended petition show that appellee Gertrude Price is a *bona fide* resident of the city of Winchester, and it is expressly alleged that her parents reside in Virginia. Her admission free to the public schools would violate not only the express letter, but also the spirit of the statute, as it was plainly the purpose of the General Assembly in the enactment of the statute that the benefit accruing from the maintenance of such schools should be limited to *bona fide* residents of the city, on whom the burden for their maintenance is cast.

The circuit judge erred in his construction of the statute, and the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

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CASE 49—ACTION BY D. B. SHAWHAN AGAINST HARRISON COUNTY FOR COMPENSATION FOR COLLECTING BACK TAXES.—OCT. 21.

Shawhan v. Harrison County.

APPEAL FROM HARRISON CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

TAXATION—COLLECTION—AUDITOR'S AGENT—SPECIAL AUTHORITY—COMMISSIONS—COLLECTOR DE FACTO.

Held: 1. A county auditor's agent, whose duty is limited to collection of omitted taxes, was appointed under special authority to collect such of certain back taxes as to which the sheriff had been exonerated and such as were due the county separately from the State, for which the agent was to receive a certain commission. HELD, that he was not entitled to collect taxes due the county on distilled spirits in bonded warehouses, as Kentucky Statutes, 1899, sections 4105-4114, governing the collection of taxes on such spirits, make them payable to the officer entitled to receive the same, and by section 4129 the sheriff is the collector of county taxes if he has executed the proper bond.

2. An auditor's agent, in collecting taxes which it was the sheriff's duty to collect, was, as to the taxpayers, a de facto official acting under color of office, and the county could sue to compel him to pay over such tax without thereby admitting his authority to act.

J. I. BLANTON, W. S. PRYOR AND D. B. SHAWHAN, FOR APPELLANT.

Appellant was empowered by the fiscal court of Harrison county to assess such property as may have been omitted from the tax book, and only in special cases when so directed by the auditor was he authorized to collect any taxes and then only for the State's part of any tax that may be owing or delinquent.

Where there had been no assessment of the property he had the right to assess and cause the taxes to be collected. As to his authority and compensation the order states, "that this order is to be construed to include the collection only of such taxes as are due the county separately from the State, and as to which taxes he can not recover or collect as said auditor's agent; and for his services in the collection of said taxes he is to have an

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amount equal to one-fourth of all sums so collected."

Under this arrangement and agreement appellant collected taxes for which the court refuses to pay him the commission to which he is entitled, and we ask a reversal.

1. Because the taxes were collected under authority of the court.

2. Because the order of court gives authority and constitutes appellant to receive the taxes collected.

3. Because the taxes collected and fees claimed for collecting same as well for those not collected were delinquent taxes; taxs due the county separately from the State, and such taxes as he could not recover or collect as auditor's agent.

4. Because the contract or order made by the fiscal court vested rights in appellant of which he should not be deprived.

AUTHORITIES CITED.

Ky. Stats., secs. 127, 1834, 1840, 4105, 4114, 4241; Civil Code, secs. 120, 128; Dodd v. King, 1 Met., 430; Com. v. Wilson, Sneed, 127; Campbell Co. v. Newport & Cin. Bridge Co., 23 R., 2058; Dills v. Boone County, 5 R., 435.

BERRY & WEBSTER, ATTORNEYS FOR APPELLEE.

The auditor's agent is not a collecting officer, but on the contrary is an assessing officer.

We contend that under the order of the fiscal court the only tax that Shawhan was authorized to collect was but a single tax, and that being "such tax as was due the county separately from the State, and which he had no authority to collect as auditor's agent, and from which the sheriff had been exonerated."

He admits in his answer the collection of $617.95, one-fourth of which he is entitled to as compensation, leaving a balance due of $463.46. Now he claims that the sheriff collected $1,563.70 of taxes which he, appellant, ought to have collected, or had the right to collect under his contract, and is claiming twenty-five per cent of that sum, which, if allowed, would leave him still owing $72.54 instead of $62.54 tendered. Consequently his plea of tender can avail him nothing.

AUTHORITIES CITED.

Helm v. Coffey, 80 Ky., 176; Henderson v. Dupree, 82 Ky., 678; L. & N. R. R. Co. v. Board of Trustees, 20 Rep., 1228; The Albin Co. v. Ellinger, 19 Rep., 1886; Lawrence Co. v. Chattaroi Ry. Co., 81 Ky., 225; L. & N. R. R. Co. v. Whitley Co., 95 Ky.,

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215; Montgomery Co. v. Menifee Co., 93 Ky., 333; Ky. Stats., sec. 127

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

Appellant was auditor's agent for Harrison county. He was also appointed by the fiscal court of Harrison county in October, 1900, to collect certain back taxes owing the county. The order of appointment contains the contract, defining appellant's authority, as well as fixing his pay. As to his authority and compensation it stated: "That this order be construed to include the collection only of such taxes as to which the sheriff has been exonerated, and such taxes as are due the county separately from the State, and as to which taxes he can not recover or collect as said auditor's agent, and for his services in the collection of said taxes he is to have an amount equal to one-fourth of all sums so collected." It is the duty of auditor's agents to cause omitted property to be assessed for taxation, and to collect the taxes due thereon. They are primarily, assessing officers. They have no authority to collect any taxes except from such property as may have been omitted from assessment. Inasmuch as the same assessment operates for both State and county purposes, the act of the auditors' agents in procuring the assessment of omitted properties inures to the benefit of the counties. In the contract involved here the parties have carefully excluded from it any act of appellant as auditor's agent. What he was employed by this order to do was entirely outside of the range of his official duties.

Acting under the authority of this appointment, as appellant claims, he collected from certain distillery warehousemen from October 14, 1890, to April 6, 1892, sums aggregating $617.95. as taxes due Harrison county on distilled spirits contained in bonded warehouses. Sections

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4105-4114, inclusive, of Kentucky Statutes, govern the assessment and collection of taxes on distilled spirits. In short, the person or corporation having the custody of distilled spirits on September 15th of each year is made liable primarily for the taxes thereon. Such custodian pays the taxes, but is given a lien on the spirts for the sum so paid, and interest, as against the actual owner. As the spirits are or may be in bond to the United States government for the taxes due it, it is provided (sections 4110, 4111) that the warehouseman shall report to the Auditor of Public Accounts the quantity of liquors so held by him, and when the United States government tax will be due, and such as will not be due before the 1st day of March after the assessment. The State tax shall be due on the 2d day of January, May, and September next, or whenever the spirits are removed from the warehouse. If the tax is not paid within five days after it is due, it is declared to be delinquent. This tax is required by section 4111 to be paid "to the officer entitled to receive the same." By section 4129, Kentucky Statutes, the sheriff is by virtue of his office the collector of taxes of the county if he executes the bonds required by law. In default thereof, the fiscal court may appoint a tax collector. The taxes on the spirits which were paid to appellant were presumably collectible by the sheriff of Harrison county, nothing appearing that he had failed to execute the proper bonds. It is neither alleged nor shown that the sheriff had ever been exonerated from their collection. By statute he was allowed 4 per cent. for collecting these taxes. We very much doubt whether it was ever really contemplated by both parties that these and similar taxes were to be embraced by the order, although its terms are broad enough to include them. But, however that may be, under the circumstances as shown,

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appellant was not even technically entitled to receive them. Harrison county sued him to recover the sums collected, with interest from the dates of collection. His answer claimed a credit for one-fourth of the sum collected, and in addition, by way of counterclaim and set-off, he claimed that appellee had wrongfully refused to permit him to collect some $1,500 of other and similar taxes, and had collected them itself, and that he was entitled to 25 per cent. of that sum also. The court sustained a demurrer to these pleas.

We are of the opinion that the pleas are not good. The taxes collected were not of the character covered by the terms of the contract, as the sheriff had not been exonerated from their collection. Consequently appellant was neither authorized to collect them nor to receive pay for their collection.

It is suggested that appellee can not maintain this action unless it admits appellant's authority to collect the taxes under the contract; for, it is said, if appellant was not so authorized, their payment by the taxpayers was voluntary, and did not operate as a discharge of their obligation. It is claimed that, until the taxes were paid to one authorized to collect them, they were not paid at all in point of law, and are yet owing by the taxpayers to the county. Appellant was, as to the taxpayers, at least a de facto official, acting under claim and color of official authority. His acts are binding on himself, at least, as well as upon the county when ratified by it; he will be required to deliver to the rightful claimant the money he has collected wrongfully in its name, while acting ostensibly within, yet actually beyond his authority.

The action was properly brought in the name of Harrison county, as the money was owing to the county in its cor-

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porate capacity and not to the fiscal court, who are but directors of the county's fiscal affairs.

The judgment is affirmed, with damages.

CASE 50—ACTION BY WILLIAM FINERAN AND OTHERS AGAINST THE CENTRAL BITULITHIC PAVING COMPANY AND OTHERS TO HAVE A CERTAIN PAVING CONTRACT DECLARED VOID.—OCT. 21.

Fineran, &c. v. Central Bitulithic Paving Company, &c.

116 495
130 654

APPEAL FROM CAMPBELL CIRCUIT COURT.

DEMURRER TO PLAINTIFF'S PETITION SUSTAINED AND THEY APPEAL. REVERSED.

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—NECESSITY OF BIDS—ORDINANCES—MONOPOLIES.

Held: 1. An ordinance requiring a contract for construction of streets to be let, after advertising, to the lowest and best bidder, passed pursuant to a charter provision that the council shall by ordinance adopt a uniform system to govern street construction, is binding till duly modified or repealed.

2. Requirement of an ordinance for competitive bidding for construction of a street is not satisfied where, as known to the council, there is but one bona fide bid.

3. Under an ordinance requiring contracts for construction of streets to be let to the "lowest and best bidder," an ordinance providing that a street shall be constructed with a certain material, which can be done by only one party, without placing the work in competition with other like or equally good material, is void.

SAMUEL C. BAILEY AND STRICKLER & JOHNSON, FOR APPELLANTS.

PROPOSITIONS AND CITATIONS.

The city council of the city of Newport having, under an ordinance which precluded competitive bidding, and required a street to be paved with a patented composition known as "bituminous macadam," awarded a contract for the paving of the street with

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that composition to a corporation having the control of the patented article, and the exclusive right to lay streets therewith, and which was the sole person that could make a *bona fide* bid therefor, the contract was void. Ky. Stats., secs. 3094, 3096 and 3103; Gen. Ordinance of City of Newport, app. May 7, 1894; Worthington v. City of Boston, 41 Fed., 23; Fones Hardware Co. v. Erb, 54 Ark., 645; Dolan v. Mayor, &c., 4 Abb. Pr. N. S., 397; Smith v. Syracuse Improvement Co., 161 N. Y., 484; State v. City of Elizabeth, 35 N. J. L., 351; Dean v. Charlton, 23 Wis., 590; Burgess v. City of Jefferson, 21 La. Ann., 143; Nicholson Paving Co. v. Painter, 35 Cal., 699; Fishburn v. Chicago, 191 Ill., 338; Beach on "The Modern Law of Contracts," vol. 2 sec. 1108.

CASES DISTINGUISHED OR DISCUSSED.

Hobart v. City of Detroit, 17 Mich., 246; Holmes v. Common Council of Detroit, 120 Mich., 226; Attorney General v. City of Detroit, 22 Mich., 263; Barbour Asphalt Paving Co. v. Hunt, 100 Mo., 22; Silsby Mfg. Co. v. Allentown, 153 Penn. St., 319; Kilvington v. Superior, 83 Wis., 222; Yarnold v. Lawrence, 15 Kan., 126; People v. Van Nort, 65 Barb., 331; In the Matter of Eager, 46 N. Y., 100; In the Matter of Anthony Dugro, 50 N. Y., 513; Baird v. Mayor, &c., of New York, 96 N. Y., 581; Newark v. Barnell, 57 N. J. L., 424.

C. J. & W. W. HELM AND AUBREY BARBOUR, FOR APPELLEES.

QUESTIONS DISCUSSED.

The right of the city of Newport to reject all bids for street improvements.

The right of the city of Newport to contract for a patented material for street improvements.

AUTHORITIES CITED AND CONSIDERED.

Ky. Stats., secs. 3094, 3096, 3103 and 3104; Gen. Ordinance of city of Newport, app. May 7, 1894; Louisville City Railway Co. v. City of Louisville, 8 Bush, 415; Chicago v. Rumpt, 45 Ill., 90; 92 Am. Dec., 196; Peabody v. Chicago Gas Trust Co., 130 Ill., 268; Foss v. Cummings, 149 Ill., 353; People v. Flagg, 17 N. Y., 584; Worthington v. City of Boston, 41 Fed., 23; Smith v. Syracuse Improvement Co., 161 N. Y., 484; State v. City of Elizabeth, 35 N. J. L., 351; Dean v. Charlton, 23 Wis., 590; Burgess v. City of Jefferson, 21 La. Ann., 143; Nicholson Paving Co. v. Painter, 35 Cal., 699; Fishburn v. Chicago, 191 Ill., 333; Beach on "The Modern Law of Contracts," vol. 2, sec. 1108;

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Hobart v. City of Detroit, 17 Mich., 246; Holmes v. Common Council of Detroit, 120 Mich., 226; Attorney General v. City of Detroit, 22 Mich., 263; Barbour Asphalt Paving Co. v. Hunt, 100 Mo., 22; Silsby Mfg. Co. v. Allentown, 153 Penn. Stat., 319; Kilvington v. Superior, 83 Wis., 222; Yarnold v. Lawrence, 15 Kan., 126; In the matter of Anthony Dugro, 50 N. Y., 513; Baird v. Mayor, &c., of New York, 96 N. Y., 581; Newark v. Barnell, 57 N. J. L., 424.

OPINION OF THE COURT BY JUDGE NUNN—REVERSING.

This appeal is from a judgment of the Campbell circuit court sustaining a demurrer to the petition of appellant. The petition is in two paragraphs. After setting forth the usual and formal averments, we quote in substance such portions as are necessary for the determination of the question before us: "That on May 8, 1902, the property holders owning more than two-thirds of the front feet of all the property fronting upon Columbia street, in Newport, Ky., between Third and Fourth streets, petitioned the general council of the city in a written petition for the reconstruction of Columbia street between Third and Fourth streets with cement curb and gutter and a roadway constructed of brick or other improved material. That after this petition was presented to the council, it, by a vote of two-thirds of the members-elect of both boards, the vote in each case being recorded on the journal of the board, passed the following resolution: "Be it resolved that the reconstruction of Columbia street, between Third and Fourth streets, by grading, combination cement curb and gutter, and bituminous macadam roadway, is hereby declared a necessity, and that the same be done pursuant to the provisions of the act governing cities of the second class and the ordinance of May 7, 1894, of the city of Newport, regulating the same; and that the city engineer report a grade for said part of Columbia street, plans and

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specifications for the reconstruction of same, and an estimate of the cost and rate per foot of property fronting or abutting thereon." Thereafter the city engineer, in the manner prescribed by law and the ordinances of the city, advertised for bids for the reconstruction of this street according to the provisions of this ordinance, and thereafter, to-wit, on the 4th day of June, 1902, two bids, and no more, for the reconstruction in conformity with this ordinance, were duly received and opened by the committee appointed by the general council to receive and open bids, who reported same to the general council. The bids are as follows: The appellee the Central Bitulithic Paving Company, $4,014.25, and Joseph Collopy, $4,214.60. And it was thereafter resolved by the general council that a contract for the reconstruction of this street with cement curb and gutter and bituminous macadam roadway be awarded to the appellee paving company at its said bid. This contract was entered into, and the city's and abutting lot owners' parts each cost more than $2,400, and the paving company was then engaged in paving the streets under this contract. It is alleged that by an ordinance of the city, a copy of which was filed, entitled "An ordinance prescribing the method of procedure governing and regulating the construction and reconstruction of all public ways and sidewalks in the city of Newport, Ky," approved May 7, 1894, then in force, and continuously in force since that time, it was provided that a contract for the reconstruction of any street in the city should be awarded to the lowest and best bidder therefor; that bituminous macadam was then, and had been continuously since March 13, 1902, a patented composition; that the machinery for making and laying this composition is patented; that the Central Bitulithic Paving Company then

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had, and continuously has had since last-mentioned date, exclusive control of this patented composition and the machinery for making and laying same, and the sole right to construct roadways of that material in that city and vicinity; that the method of making this bituminous macadam and constructing roadways therewith was known only to those having control of this patent, and that no one except the Central Bitulithic Paving Company could make, or could have made, a *bona fide* bid for the reconstruction of this street with this material; that bituminous macadam is greatly inferior to vitrified brick for the reconstruction of a roadway; that the bid offered by Joseph Collopy for $4,214.60 was a sham bid; that this bid was made by Collopy in pursuance of a conspiracy entered into between him and the Central BitulithicPaving Company, by which it was agreed that Collopy should offer a higher bid for the reconstruction of this street than that offered by the paving company; that each and all of the members of the general council at the time this bid of Collopy was received knew that it was a sham bid, and that neither Collopy, nor any one except the Central Bitulithic Paving Company, could construct the bituminous macadam roadway in that city; that each and all of the members of the general council well knew, and had continuously known since May 8, 1902, that the manufacture of bituminous macadam and the construction of the roadways therewith was and is exclusively controlled by the Central Bitulithic Paving Company, and that no one except the Central Bitulithic Paving Company could make a *bona fide* bid for the reconstruction of this street with this material; that this contract between the city and this paving company was in violation of the ordinance of May 7, 1894, particularly that part thereof which provides that a contract for the recon-

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struction of a street of the city shall be awarded to the lowest and best bidder, and is void, etc. It is admitted that the city council of Newport had duly passed an ordinance May 7, 1894, providing that a contract for the reconstruction of a street of that city should be awarded to the lowest and best bidder, and that this ordinance was still in effect, and had never been repealed or modified. In view of this admitted fact the sole question presented upon this appeal for determination is whether or not the resolution of date May 8, 1902, requiring the reconstruction of Columbia street to be made with bituminous macadam, and the contract with the paving company with reference thereto, were or not authorized and valid. In other words, had the city council of this municipality the power to award a contract for the paving of a street with a patented composition to a corporation having the control of the patent and the exclusive right to lay streets with the patented composition, and which was the sole person that could make a *bona fide* bid therefor, under an ordinance which precluded competitive bidding, and required the street to be paved with this patented composition? In effect it is contended that the ordinance of May, 1894, requiring competitive bids for the reconstruction of streets, was passed by the city council only; that, the charter of cities of the second class being silent with reference thereto, the council had the power and right to disregard the requirements of this ordinance. And it was also contended that, even if this requirement of competitive bidding had been in the charter, a compliance with the forms, as was done in this case, would have been sufficient. But, even if a compliance with the form was not sufficient, still it was not applicable to a case like this, where there could be no competitive bidding, as competitive bidding would deprive the city of availing itself of the benefit of patented articles.

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By the charter governing second-class cities in this Commonwealth it is provided that the general council shall by ordinance adopt a uniform system to govern and regulate the construction and reconstruction of all public ways and sidewalks of the city. Under the authority given them by the charter the general council of the city of Newport passed such ordinances, and one requiring that in the construction and reconstruction of its streets the contract for same should be let, after advertising, to the lowest and best bidder. These laws or ordinances were as binding on the council as if the same had been inserted in the charter, until modified or repealed by the council in the way and manner provided by law. This provision in the ordinance was evidently inserted for the benefit and protection of the taxpayers and all the citizens, and especially those owning abutting property on streets to be constructed and reconstructed; and, in our opinion, the council had no right and power to ignore the provisions of this ordinance.

We can not agree with the contention that, if the requirement of competitive bidding was necessary, a compliance with the forms, as was done in this case, would have been sufficient. It is admitted by the demurrer in this case that Collopy, the other bidder, agreed and entered into a conspiracy that they would go through the forms of a bidding, and that Collopy was to offer a higher bid for the work, and that each and all of the members of the council knew this fact, and also knew that appellee Central Bitulithic Paving Company could only make a *bona fide* bid for the reconstruction of this street with this material, and that they knew this when they passed this ordinance of May, 1902, fixing bituminous macadam as the only material for the reconstruction of this street. To say the law requiring competitive bidding was binding, and to accept

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such competitive bidding as a compliance therewith, would be a farce.

The other proposition—and the only real question to be decided—is more serious, and that is whether or not the law requiring competitive bids was intended to be and can be made applicable to things or material for the construction or reconstruction of streets where it is impossible to have competition as in this case, and thus prevent patent processes from being used, and the city from using such material when it deems it to be for the best interest of the city so to do. This court has never passed upon this question, and the courts of other States are divided upon it. The right of a city to avail itself of patented inventions in the improvement of streets, etc., where the law required the letting of contracts to the lowest bidder, has been before the courts of several States, and the adjudications thereon are not uniform, and the courts are not unanimous in their opinions. In Wisconsin, California, Louisiana, New Jersey, and Illinois the right has been denied, while in Michigan, Kansas, New York, and Missouri it has been sustained. These cases appear to discuss ordinances or charters that required the city council to accept the bid of the lowest responsible bidder, not giving any discretion to the council except as to solvency—unlike the ordinance in this case, which required the council to accept the lowest and best bid, which gave the council the discretion to accept the bid of the lowest and best bidder after considering all the questions involved, such as price, quality, and durability of material, responsibility of the bidders, the interest of taxpayers of the whole city, and especially of those who owned abutting property. See the case of Trapp v. City of Newport, 25 R., 224, 74 S. W., 1109. The substance of the reasons given in the cases decided by the courts of

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Michigan, Kansas, New York, and Missouri in upholding an ordinance requiring a street to be constructed or reconstructed with a patented article, and where, from the nature of the case, there could be no competition, are given in the case of Hobart v. The City of Detroit, 17 Mich., 246, 97 Am. Dec., 185, decided by a divided court. In that case a plaintiff sought to enjoin a tax levied on a lot owned by him for the purpose of paying the expense of paving in front of it with Nicholson pavement, upon the ground that the contract for the pavement was illegal. The charter of the city of Detroit provided that no contract for any public work, where the amount of such contract exceeded $200, should be let or entered into except to and with the lowest responsible bidder. The right to lay the Nicholson pavement in Detroit at the time this contract was let was owned exclusively by the firm of Smith, Cook & Co., the contractors, who alone, therefore, could and did bid for the contract, and, there being no possibility of a competitor, the contract was awarded to them on their own terms. In denying the plaintiff the relief sought, the court, by Cooley, C. J., said: "The doctrine of the complaint leads to this conclusion: That wherever, from the nature of the case, there can be no competition, the city can make no contract, however important or necessary for the interest of the city, since contracts, except by public letting are forbidden by the express terms of the statute, and those by public letting are forbidden by an implication which is equally imperative. And, if applied in this case, however much the mode of paving may exceed all others in utility, it can not be adopted in the city of Detroit, or in any other city with like provisions in its charter, even although the proprietors of the patent might be willing to lay it on terms more advantageous to the

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city than those on which pavement of less value could be procured." On the other hand, the substance of the cases deciding against the validity of such ordinances and contracts by the courts of Wisconsin, California, Louisiana, New Jersey, and Illinois is given in the case of State of New Jersey v. The City of Elizabeth, 35 N. J. Law, 351. The city council of the city of Elizabeth had passed an ordinance "that Morris avenue, from the track of the Central Railroad Company of New Jersey to the city line should be paved with Stow foundation pavement." Sealed proposals for paving in accordance with the ordinance were received from John Bryan & Co., and, they being the only bidders, the contract was awarded to them at their bid. John Bryan & Co. owned the exclusive right to lay the Stow foundation in the city of Elizabeth. Section 123 of the charter of 1863 of Elizabeth directed that contracts exceeding $100 "shall be advertised, and shall, at all times, be given to the lowest bidder." In that case the court said: "This section of the statute contemplates the public advantage of an open, free competition in doing work and furnishing materials for all public improvements, which is inconsistent with the exclusive right to sell a patented article previously selected and alone acceptable. In the case of John Coar *et al.* v. Jersey City (at the present term of this court) [35 N. J. Law, 404] it is decided that, where the resolution of the city council was to pave with the Nicholson pavement, that being a patented pavement, and the right to use it in Jersey City exclusively held by the only bidder for the work, there was not and could not be any competition within the intent of the charter, and for that reason the resolution and proceeding in awarding the contract to such bidder should be set aside. It requires considerable ingenuity to avoid such a reasonable

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conclusion from such plain and direct statutory requirements. No one can compete on equal terms with a man who controls the sale of the thing needed. Bidding under such a condition is but a form, and the result must almost necessarily be deceptive and injurious to persons who are to be assessed for payment. There can hardly be a lowest bidder, within the intent of the charter where there can be in reality but one bid. This question does not appear to have been considered in State v. Ayers, (June term, 1871) for the reason, probably, that there are other provisions in the charters of many of our cities taking patented processes out of the operation of a similar section. The policy of such exception is not within our province to determine after legislative authority is given, but I must give a hearty approval of the expression used by Judge Campbell (dissenting opinion) in the Detroit Case, where he says: 'I can conceive no more fruitful source of possible inducements to corruption than the monopoly of paving the streets of a large city.'"

It is unnecessary for this court to determine which doctrine is correct, that of Michigan or that of New Jersey, for the reason that the charter or ordinance under consideration in these cases required the council and made it imperative that it should accept the bid of the lowest responsible bidder. The ordinance in the case at bar required the council to accept the bid of the lowest and best bidder, and the reasoning given by the court in the case of Fishburn v. Chicago, 171 Ill., 338, 49 N. E., 542, 39 L. R. A., 482, 63 Am. St. Rep., 236, decided February 14, 1898, is peculiarly applicable to the case under consideration. The court in that case said: "If the requirement that the asphaltum to be used in the improvement should be obtained from Pitch Lake, in the Island of Trinidad, tended to restrict competi-

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tion among those who might desire to become bidders for the performance of the work of improving the street, or tended to create a monopoly in favor of any one having for sale the asphaltum necessary to be used in the work of paving the street, it would fall under the ban of this general rule of the law, and must be declared inoperative and void. But it may be said that cities, in the construction of public improvements, ought to have, as have individuals in the construction of private structures, the right to select for use the article or substance best fitted and adapted to the purpose, and that to deprive the public of the right to select and use such superior articles is opposed to public policy, and positively disadvantageous to the public. The force of this argument must, of course, be admitted; but upon reflection it is readily seen it is not necessary to foster and create a monopoly and prevent competition in the letting of public contracts by providing in ordinances that a certain substance or article, and no other, shall be used. If it be the judgment of the city council that the most suitable and best materials to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in the control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance, or compound the standard of quality or fitness, and to require that material equal in all respects to it should be employed. An ordinance making it indispensable that an article or substance in the control of but a certain person or corporation shall be used in the construction of a public work must necessarily create a monopoly in favor of such person or corporation, and also limit the persons bidding to those who may be able to make the most advantageous terms with the favored person or corporation. If all the ordinances adopted by the city council of the city of Chi-

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cago providing for the paving of the streets and public places in the city should select the stock in trade of a particular firm or corporation as the only material to be used in making such street improvements, the evil would be intolerable; and, if they may lawfully select such article in an ordinance, it can not be unlawful to make it the settled policy of the city that material for paving the streets shall be purchased from but one seller." The ordinance in the case at bar directed that this street be improved with bituminous macadam, and it is admitted that the appellee the Central Bitulithic Paving Company had the complete and exclusive control of this substance, and that no one but it could have made a *bona fide* bid for the construction of this street with this material, and that each member of the council knew these facts at the time the ordinance was passed. In Beach on the Modern Law of Contracts (vol. 2, section 1108) it is said: "Whatever tends to prevent competition between those engaged in an employment or business impressed with a public character is opposed to public policy, and therefore unlawful; and whatever tends to create a monopoly is unlawful, as being contrary to public policy. All grants creating monopolies and acts tending to prevent proper competition are, by common law, illegal and void."

For the reasons given, we are of the opinion that the ordinance requiring the street to be improved with bituminous macadam, without placing it in competition with other like or equally as good material for such purposes, was and is void, and the court erred in sustaining a demurrer to appellant's petition. Wherefore the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

Judge Paynter dissents.

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CASE 51—ACTION BY MCCORMICK HARVESTING MACHINE CO. AGAINST W. A. ARNOLD AND ANOTHER ON NOTES.—OCT. 21.

McCormick Harvesting Machine Company v. Arnold, &c.

APPEAL FROM GARRARD CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFF APPEALS. REVERSED.

SALES—HARVESTING MACHINE—WARRANTY—SALE ON TRIAL—FAILURE TO RETURN—ACTION FOR PRICE—ESTOPPEL—BREACH OF WARRANTY.

Held: 1. Where a warranty of a harvesting machine was signed by the buyer merely as an order for the machine that it might be procured for trial, and the real contract for its purchase was made by the parties after the machine arrived, when the notes for the price were executed, and it was then orally agreed by the seller's agent that the machine was warranted to do a certain amount of work per day, the buyer was not limited to the written contract.

2. Where defendants purchased certain agricultural machinery on trial under a warranty that it would do a certain amount of work, which it failed to do, they were bound to offer to return the machine within a reasonable time, and, having failed to make any objection thereto for more than three months and until suit for the price, they were estopped to deny liability therefor.

3. Where a contract for the sale of farm machinery provided that the buyer was to test the machine, and, if it did not perform the guaranteed work, he was to return the machine, and be given back notes given for the price, he was not entitled to retain the machine, and, on being sued for the price, claim damages for breach of warranty.

J. E. ROBINSON, ATTORNEY FOR APPELLANT.

1. In this action on three notes given for a corn husker and shredder the defendant in his answer alleged that plaintiff in the contract warranted the machine to husk and shred 150 to 200 shocks of corn and fodder per day, and if it failed to do so plaintiff would take it back and give up the notes, but it is nowhere alleged that upon its failure to do the work it was warranted to do, the defendant offered to return it or demanded

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the surrender of his notes. For this reason we contend that defendant's answer was bad and plaintiff's demurrer thereto should have been sustained.

2. The court erred in striking out the second paragraph of plaintiff's reply to the answer, in which plaintiff alleged that defendant, after purchasing and testing the machine, signed a paper stating: "I find no fault with the material in the machine, nor the kind and character of work it does. So far as I know the work of the machine and the material it is made of is all right."

3. The court erred in overruling the plaintiff's motion for a judgment on the face of the papers, the court holding the burden on appellees and the appellees having closed their case in chief.

4. The court erred in permitting appellees, after they had closed their evidence in chief, to file a second amended answer after plaintiff had entered a motion for a judgment on the face of the papers.

5. The machine was handled for defendant by men wholly inexperienced in the use of such machinery, and its capacity for doing the work for which it was sold was never fairly and fully tested, and the appliances used with which to operate it were indifferent and unsuitable for that purpose, as shown by the evidence.

AUTHORITIES CITED.

Shipman's Common Law Pleading, pp. 203, 213; Black on Contracts, vol. 1, secs. 821, 793; 4 R., 841; Campbell Printing Press Co. v. Tharp, L. R. A., vol. 1, p. 645; Stone v. Russell, 13 R., 970; Western Assur. Co. v. Meath, 10 R., 708; Clark on Contracts, p. 184; Beach on Contracts, vol. 1, secs. 165, 166, 735; Ford v. Crenshaw, 1 Litt., 68; Am. & Eng. Ency. of Law, vol. 3 (1st ed.), p. 834; Thompson v. Thompson, 93 Ky., 435; Mortz v. Schwartz, 15 R., 269; Frick v. Morgan & Co., 2 4R., 836.

J. M. ROTHWELL AND WM. HERNDON, ATTORNEYS FOR APPELLEES.

1. Appellees admitted the execution of the notes sued on and alleged and proved the consideration of the agreement as to the delivery up of the machine in case it did not do the work it was guaranteed to do, the entire agreement being in parol.

2. In order to avoid this appellant offered to file a writing setting up a new contract for two notes—one for $112 and the other for $113, instead of the three notes sued on, but the court properly treated the contract as a parol one.

3. Appellees refused to pay the notes before suit, because the

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machine would not do the work it was guaranteed to do and nothing was done by appellants to make it do the work.

We submit that upon the pleadings and proof the judgment should be affirmed.

OPINION OF THE COURT BY JUDGE SETTLE—REVERSING.

The appellees, W. A. Arnold and J. I. Hamilton, were sued by the appellant, McCormick Harvesting Machine Company, upon three promissory notes of $75 each of date November 11, 1901, and due December 1, 1901, June 1, 1902, and January 1, 1903, respectively. The payment of the notes was resisted by appellees in the court below; the defense interposed by their answer being that they were executed for one McCormick husker and shredder, which they received of appellant, and which its agent warranted would husk and shred 150 shocks of corn and fodder, or would shred 200 shocks of fodder, per day, and that if, upon a fair trial, it failed to do so, appellant would return to appellees their notes and take back the machine; that the notes were executed upon that condition alone, and would not have been given but for the warranty mentioned. The answer further avers that the machine did not perform its work as warranted, though given a fair trial by the appellee Arnold, but only had the capacity to husk and shred 100 shocks of corn and shred a like quantity of fodder per day, and that by reason of the breach of warranty appellees are entitled to the return of their notes and appellant to the return of the machine, and a tender of the return of the machine to appellant was made in the answer. The action was upon all three of the notes, though instituted soon after the maturity of the first one, as it was stipulated in the contract between the parties that, in the event appellees failed to pay any one of the notes within thirty days after its maturity, all should become due and payable.

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In avoidance of the defense relied on by appellees, the appellant, by reply, denied the warranty set up in the answer or any agreement to return the notes or retake the machine by reason of its breach, and alleged that the only contract made between their agent and appellees in reference to the machine is contained in a writing signed by appellees and bearing date October 21, 1901, wherein, among other things it is stipulated that the "McCormick Harvesting Machine Company warrants this machine to be well made, of good material, and durable with proper care, and to do the work for which it is intended, when properly adjusted and operated (condition of fodder and corn being considered). If upon one day's trial the machine should not work well, the purchaser must give immediate notice to J. W. Lindley, general agent for the McCormick Harvesting Machine Company at Louisville, Ky., and to the local agent from whom the machine was purchased, and allow a reasonable time to send a person to put it in order. If it can not be made to work well, the purchaser must return it at once to the agent from whom he received it, and all cash notes, and securities received in settlement will be refunded, which, when done, shall constitute a settlement in full of the transaction. Three days' use of the machine, or continued possession without notice of its failure to work properly, shall be considered an acceptance of the same, and a fulfillment of the warranty. . . ." The reply further avers that the foregoing stipulation contains the only warranty made in the sale of the machine, and that no breach of same has arisen, but that the stipulation providing for the trial of the machine and notice of its defects, if any, was violated by appellees, who gave appellant no notice of any defect therein, or its failure to do the required amount of work, but continued to use the machine

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without complaint, by reason of which they are estopped to claim the return of the notes. The rejoinder denies that the writing contains the contract between the parties, and avers that the contract set forth in the answer was in parol, and was made at a later date, to-wit, at the time of the execution of the notes sued on. We find that this contention of appellees is apparently sustained by the evidence. Besides, the writing referred to shows that it was dated at a time anterior to the execution of the notes sued on, and it recites that two notes were given by appellees for the machine—one for $112, due December 1, 1901; and the other for $113, due December 1, 1902—each bearing date October 21, 1901, whereas the notes that were really executed for the machine were three in number, for $75 each, and all bear date November 11, 1901. It is patent, however, that the writing was signed by appellees as an order for the machine, that it might be procured for inspection or trial, though the real contract for its purchase was made by the parties when the notes were executed, and before any trial was made of the machine. We are of opinion, however, that neither the pleadings nor evidence authorized the verdict or judgment rendered in the case, as, according to the contract relied on by appellees, it was their duty to have returned, or offered to return, the machine, in a reasonable time after discovering that it would not perform the work as guaranteed by the agent of appellant. In discussing sales "on trial" or "approval" and "sale or return," Mr. Benjamin, in his admirable work on Sales (4th Ed.), sections 595, 596, says: "In the former class of cases there is no sale until approval is given either expressly, or by implication, resulting from keeping the goods beyond the time allowed for trial. In the latter case (sale or return) the sale becomes absolute, and the

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property passes only after a reasonable time has elapsed without the return of the goods. In sales 'on trial' the mere failure to return the goods within the time specified for trial makes it absolute. . . ." In the case at bar it appears that appellees not only had ample time to try the machine, but they used it for some time after discovering that it was incapable of doing the quantity of work which they claim appellants' agent warranted it to do, and that, too, without serious complaint to the agent, or an offer to return the machine. Indeed, it appears from the record that no offer was ever made by the appellees to return it until the time of the filing of their answer, which was after the institution of the suit, and fully three months after the delivery of the machine to them. Upon such a state of case the appellees are, it seems to us, estopped to deny liability on the notes. Ordinarily, in the sale of an article of personal property where there is a breach of warranty, the purchaser may return the property and recover the purchase price, or he may elect to retain it and recover damages for the breach of the warranty, in which case the measure of damages would be the difference in the value of the property in its condition at the time of the sale and what it would have been worth if of the quality warranted. But that rule does not apply in this case, for here the contract was that appellees were to test or try the machine, and, if it turned out that it did not perform the guaranteed work, appellees were to be given back their notes, and the machine was to be returned to, or be retaken by, the appellant. It was the duty, therefore, of appellees, to notify appellant's agent of the failure of the machine to do the guaranteed quantity of work within a reasonable time after ascertaining such failure, and in a like reasonable time to offer to return the machine, or, at any rate, to notify appel-

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lant's agent that it was subject to his order or right to retake it. But, having failed to give such notice, or to offer to return the machine within a reasonable time after their discovery of its incapacity to perform its work according to the warranty, the sale became absolute, and appellees' liability upon the notes fixed.

In this view of the law, the instructions given by the lower court were altogether erroneous, for which reason the judgment is reversed, and cause remanded, with directions to the lower court to grant appellant a new trial consistent with the opinion herein.

CASE 52—ACTION BY KATE B. SWINEBROAD, &C., AGAINST GEORGE P. BRIGHT, &C., AS EXECUTORS OF GREENBERRY BRIGHT, DECEASED, TO RECOVER A LEGACY.—OCT. 22.

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Swinebroad v. Bright, &c.

APPEAL FROM LINCOLN CIRCUIT COURT.

FORMER OPINION WITHDRAWN AND ON REHEARING REVERSED.

LEGACIES—ADEMPTION—PLEADING—TRANSACTION WITH DECEDENT—WITNESSES—COMPETENCY.

Held: 1. The allegation of the answer, in an action for legacy, that a payment by testator after the date of the will was intended by him in satisfaction of the legacy is an allegation that it was so intended by him when it was made.

2. The executor and his surety, in an action against him for a legacy, are not incompetent, under Civil Code, section 606, to testify to declarations of testator to show that a payment by him was intended in satisfaction of the legacy; they not being interested in the result, the controversy being really between such legatee and the residuary legatee. Not so, however, the legatee or her husband, or the residuary legatee.

3. One interested in the result of the action may not testify to a transaction between him and deceased in the presence of an-

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other though such other testify for the other party in regard thereto.

R. H. TOMLINSON, G. B. SWINEBROAD AND R. P. JACOBS, ATTORNEYS FOR APPELLANT.

Greenberry Bright, the father of the appellant, Kate B. Swinebroad, died December 3, 1896, and by his will devised to his said daughter as follows: "I will and bequeath to my daughter, Kate Swinebroad, $1,000.00 in addition to the amount paid her and her family."

This legacy the appellant demanded of the executors of her father, who refused to pay it or any part of it, alleging that after the execution and publication of the will the appellant sued the executors for the recovery of the residue of a certain sum of $1,000 in money which was given to her during the testator's lifetime to be paid out of the proceeds of certain notes, and on the merits of said suit judgment was rendered in her favor, and they allege that said gift was an ademption of the legacy sought to be recovered in this action.

1. Our contention is that a gift of money made to an heir after the date of the testator's will is not an ademption of a legacy made in his will nor even can it be a satisfaction of the legacy unless those claiming against the will allege and prove that such was the intention of the testator at the time the gift was made.

2. Even if appellee's contention is right in this matter that a gift of *money* is presumed to be a satisfaction or an ademption of a legacy in a previous will, their contention can not be maintained in this case because the proof shows there was no gift of money but a gift of the *proceeds of certain notes* which at the time of testator's death, had not been converted into money nor passed entirely out of the control of the testator.

3. To constitute such an advancement as will make a gift that will be considered satisfied or adeemed by a legacy in a previous will, the ancestor must, in his lifetime, divest himself of all interest in the property or gift set apart to the heir.

4. The mere fact of the gift does not make it an ademption or satisfaction, but the parties seeking to prevent the legatee from receiving the legacy in a deliberately executed will must allege an intention on the part of the testator to adeem or satisfy the legacy.

5. The proof in the case fails to show an intention on the part of the testator to adeem or satisfy the legacy, giving the legatee the proceeds of said notes.

The lower court having held adversely to our contention, we respectfully ask for a reversal of its judgment.

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AUTHORITIES CITED.

Ky. Stats., secs. 4840, 4835, 2068; Duncan's Trustee v. Clay, 13 Bush, 48; Grigsby's Exr. v. Wilson, 9 Bush, 94; Ferguson v. Bush, 9 R., 886; Glasscock v. Layle, 21 R., 860; Boone v. Thornberry, 21 R., 368; Hocker v. Gentry, 3 Met., 473; Wickliffe v. Preston, 4 Met., 478; Lilly v. Curry's Exr., 6 Bush, 590; Am. & Eng. Ency. of Law, pp. 104, 108, 87, 100.

W. G. WELCH AND HILL & McROBERTS, ATTORNEYS FOR APPELLEE.

We contend:

1. Where a parent gives a legacy to his child, and afterwards, during his own lifetime, makes an advance to such child, such advancement, *if ejusdem generis*, is presumed to be an ademption of the legacy in toto or pro tanto, according as it is equal to, or less than, the legacy.

2. There is no proof in this case to show a contrary intention on the part of the testator, so the payment of the $1,000 to appellant by the testator through his attorney, G. B. Swinebroad, was an ademption of her legacy.

AUTHORITIES CITED.

Am. & Eng. Ency. of Law, vol. 1, p. 613; Pomeroy's Eq. Jur., vol. 1, sec. 554; Highbaugh's Exr. v. Brunk, 5 Ky. Law Rep., 175; Timberlake v. Parrish's Exr., 5 Dana, 346.

OPINION OF THE COURT BY JUDGE HOBSON ON REHEARING—REVERSING. (FOR FORMER OPINION, SEE 73 S. W., 1031; 24 R., 2253.)

Appellant's father devised to her $1,000. Appellee, as his executor, refused to pay her the amount, on the ground that the legacy had been adeemed. She thereupon sued to recover it. The case is here for the second time. The facts of the case are stated in the former opinion. See Swinebroad v. Bright, 23 R., 55, 62 S. W., 484. On that appeal there had been a judgment for defendant, which was reversed on the ground that under the statute the burden of proof was on the executor to show that the $1,000 paid appellant after the date of the will was intended by the testator in satisfaction of the bequest to her. On the return of the case the defendants amended their answer in conformity to the opin-

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ion, and, the case being tried before a jury, a verdict was returned in favor of the defendants, on which judgment was again entered, and the plaintiff appeals.

The only ground of complaint necessary to be noticed relates to the admission of evidence, as no objection is taken to the instructions of the court, and the amended answer was sufficient, for the allegation that the payment was intended by the testator in satisfaction of the legacy is necessarily an allegation that it was so intended by him at the time the gift was made; and the court, in its instruction, thus submitted the issue to the jury. The verdict of the jury, therefore, supplied this averment in the answer, and cured the omission, if material.

The executor himself and his surety in his bond were introduced as witnesses to prove the declarations of the testator as to the purpose of the gift of $1,000. It is insisted for the appellant that, being defendants in the action, they were testifying for themselves as to a verbal statement of the decedent, and that their testimony was incompetent, under section 606 of the Civil Code. We do not so understand the rule. The question before the court was whether the estate of the testator owed the plaintiff $1,000. The testimony of the executor and his surety was to the effect that the estate did not owe the money. It was the duty of the executor to protect the estate, and we know of no rule of law making him an incompetent witness for the estate as to a transaction of his own decedent with him. If the $1,000 was not going to the plaintiff, it belonged to the residuary devisee. The executor had no interest in the fund. The judgment in the case did not affect his liability in any way, as in either case he had to pay the money over to somebody. He was not, therefore, interested in the result at all, and was not testifying for himself. Neither was the surety, J. B. Owsley. The

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Code of Practice was aimed to widen, not narrow, the admissibility of witnesses, and one of the purposes of the section was to protect the estate of decedents. To hold the executor incompetent in a case like this would be to defeat the purpose of the statute. For this is really a controversy between the devisees under the will as to which of them is entitled to the part of the estate in question, and the executor is only in effect the stakeholder between them. The cost of the action, if decided against the executor, would be paid out of the estate; and he has no interest in the controversy, except to procure the direction of the court in the execution of his trust.

The court also allowed George Bright, one of the residuary devisees, to testify as to a verbal statement of the testator to him. The testimony is objected to on the ground that, being one of the residuary devisees, and therefore entitled to the fund in contest, or a part of it, if not recovered by the plaintiff, he was testifying for himself, and that the evidence should not have been admitted, under section 606 of the Code. It has been held that, in a contest over a will, all the devisees are competent witnesses as to transactions with the deceased. Flood v. Pragoff, 79 Ky., 607, 3 R., 372; Williams' Ex'r v. Williams, 90 Ky., 28, 13 S. W., 250, 11 R., 828. Our first impression was that the same principle should be applied between devisees as to transactions with their testator, but on reconsideration we conclude that the statute does not permit this. It forbids one testifying for himself as to a verbal transaction with one who is dead. The residuary devisee was testifying here for himself, for, if appellant's claim was defeated, the fund would go to him and the other residuary devisees. Hopkins' Adm'r v. Faeber, 86 Ky., 223, 9 R., 530, 5 S. W., 749. Under the express mandate of the Code, he can not testify as to the transactions with the de-

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cedent. Turner v. Mitchell, 22 R., 1784, 61 S. W., 468; Townsend v. Wilson, 24 R., 1276, 71 S. W., 440. For the same reason, appellant, Mrs. Swinebroad, can not testify to anything which took place between her and the testator. Her husband may testify to any matter which she might testify to, as either one of them, but not both, may testify. Bright's Ex'rs v. Swinebroad, 21 R., 369, 51 S. W., 578. The husband, under the rule laid down in that case, can not, therefore, testify to any transaction between him and the testator. The court allowed him to testify as to the transaction proved by the witness John Bright, but, as John Bright was not interested in any way in the estate, it was improper to allow appellant's husband to testify as to a transaction between him and the testator in John Bright's presence, and the introduction of John Bright as a witness for appellee did not change the rule. We therefore conclude that the testimony of George Bright and appellant's husband, so far as they testified to transactions with the testator, should have been excluded.

The declarations of the testator, whether made before or after the notes were placed in the hands of the attorney, were properly admitted, as they were all made before the money was collected and the transaction closed up. They were so interwoven and so closely connected that they were competent to show the intention of the testator in the transaction which he then had in hand.

We have had some difficulty in determining whether there should be a new trial on account of the admission of the evidence of George Bright, under all the circumstances, and, in view of the fact that there have been heretofore two judgments in favor of appellees. But the testimony of George Bright, taken alone, was sufficient to warrant the verdict; and, as the jury is the sole judge of the credibility of the

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witnesses, we can not say what effect on their verdict this testimony may have had. We conclude, therefore, a new trial must be granted. The former opinion (see Swinebroad v. Bright, 24 R., 2253, 73 S. W., 1031) has been withdrawn.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

CASE 53—ACTION BY S. B. VANCE'S ADMR. FOR A SETTLEMENT OF HIS ESTATE, IN WHICH NANNIE D. VANCE AND OTHERS INTERVENE, CLAIMING RENT OF CERTAIN REAL ESTATE.—OCT. 22.

Vance, &c. v. Vance's Admr. &c.

APPEAL FROM HENDERSON CIRCUIT COURT.

JUDGMENT FOR THE ADMINISTRATOR AND THE INTERVENORS APPEAL. REVERSED.

EXECUTORS AND ADMINISTRATORS—REAL ESTATE—LEASE BY ADMINISTRATOR—ACCRUING RENTS—RIGHTS OF HEIRS.

Held: Rent accruing after intestate's death under a lease of his real estate by the administrator, under order of court to raise funds necessary to pay debts, belongs to the heirs and not to the administrator, though the administrator could have sold the land to pay the debts.

CLAY & CLAY, ATTORNEYS FOR APPELLANTS.

QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. Upon the death of S. B. Vance, the title to his real estate and the right to possession thereof passed immediately to his heirs and they are entitled to the rents, issues and profits thereof until the sale of the land at the instance of creditors is confirmed. Ball v. First Nat. Bank of Covington, 80 Ky., 502.

2. The lower court had no right to appoint a receiver to take charge of the lands and collect the rents in the absence of evidence showing the estate was insolvent, and in addition thereto that the heirs were committing waste or improperly looking after the lands. Civil Code, sec. 298; Civil Code, sec. 299; Collins v. Richart, 14 Bush, 621; Hounshell v. Fire Ins. Co., 81 Ky., 304.

3. If the court had a right to appoint a receiver that does not

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estop the heirs from claiming the rents collected by and in the hands of the receiver so appointed. Hounshell v. Fire Ins. Co., 81 Ky., 304.

4. The court had no right to direct the administrator to rent out the real estate or collect the rents.

5. The administrator having taken charge under such order was nothing more than a receiver and stood in no better attitude; and as possession by the receiver is possession for the rightful owner, so possession by the administrator was possession for the heirs.

6. The fact that the Ohio Valley Banking & Trust Company was in possession of the land in this case as receiver, as administrator or in any other capacity whatsoever, does not affect the right of the heirs to the rents. Taliaferro v. Gay, 78 Ky., 498; Ball v. First Nat. Bank of Covington, 80 Ky., 502.

7. The heirs are not responsible to the administrator for commissions on rents collected by it.

YEAMAN & YEAMAN, FOR APPELLEES.

The heirs were not "entitled to the possession." The land was in the hands of the court, under the control of the court, to rent or sell. The court, for good reasons, rented it instead of selling it. The proceeds of the renting stand as much for the payment of the debts of the ancestor as would the proceeds of the sale, as, indeed, it since has been paying not more than fifty cents on the dollar of the ancestor's debts.

The case cited is an authority for the proposition that as long as the heirs are entitled to the possession of the land they are entitled to the rents, issues and profits, but when they are rightfully out of possession and the possession is in the court to deal with as the interest of all parties may require, the case is different. Ball v. First Nat. Bank of Covington, 80 Ky., 502.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

S. B. Vance died July 15, 1901, and on August 16th this suit was filed by his administrator to settle his estate. It was alleged in the petition that the decedent owned at his death several tracts of land, that the personalty was insufficient for the payment of his debts, and that a sale of the real estate would be necessary. A settlement of the estate was prayed, and a sale of so much of the real estate as might be necessary to pay the debts. In this condition of the record, on September 14th on motion of plaintiff, the adminis-

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trator, it was ordered that the plaintiff rent out the real estate of the decedent on Wabash Island for the ensuing year on the best terms obtainable, taking bond, subject to the further orders of the court. The land was rented by the administrator under the order for the year 1902 for the sum of $1,634.15. Thereafter the heirs at law of the decedent filed in the action their petition claiming the rent, and, the court having adjudged against them and dismissed their petition, they have appealed.

It was agreed on the hearing that the assets of the estate, including the rent in question, will not be sufficient to satisfy the debts of the decedent. It is insisted for the appellees that the land was under the control of the court, and that for good reasons it was ordered to be rented out, instead of being sold, and that the proceeds of the rent stand as much for the payment of the debts of the ancestor as would the proceeds of the sale. This seems to have been the view of the circuit court. In Collins v. Richart, 77 Ky., 621, it was held that a vendor of land, who had retained a lien on it for the purchase money, but not on the rents, is not entitled to have the lands put in the hands of a receiver, and thus secure a lien on the rents. The same rule was applied to a mortgage. Newport & Cincinnati Bridge Co. v. Douglass, 75 Ky., 705; Douglass v. Cline, Id., 621. In Taliaferro v, Gay, 78 Ky., 496, these cases were approved, and it was held that the rents accruing before the confirmation of the sale belonged to the owner of the land, and were subject to attachment by his general creditors. In Ball v. First National Bank, 80 Ky., 501, 4 R., 400, the testator died insolvent, and the suit was filed to settle his estate. The real estate had been rented by the testator to tenants who paid the rents monthly, and the controversy arose between the heirs and the creditors of the testator as to the title to the rents. It was

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held that rents accruing before the death of the testator vested in the executor as assets, but that the rents accruing after the death of the testator, and before the confirmation of the sale, belonged to the heirs. The court said: "If the property descended is being wasted, or about to be sold, so as to defeat or delay the creditors of the ancestor, there is ample remedy to prevent either, and preserve the property for the satisfaction of his debts; and the remedy afforded by law on this alternative state of facts is an additional reason for allowing the heirs to take the rents so long as he holds the title and is entitled to the possession. It is insisted by counsel for the creditors, that, as the chancellor has jurisdiction for the settlement of the estate, he should maintain it for all purposes, and therefore subject the rents accruing after the death of the ancestor, to prevent a multiplicity of suits against the heirs for their aliquot parts. This argument is founded on a premise which does not exist, but is erroneously assumed, as no action could be maintained for rents thus accruing, and the chancellor has no incidental jurisdiction over the rents, because they are neither legal nor equitable assets of the estate." In Elliott's Adm'r v. Bush, 3 Ky. Law Rep., 466, which was also a suit to settle an insolvent estate, during the progress of the suit the administrator, who was likewise guardian for the infant children, rented out the land and collected the rents. It was held that the heirs were entitled to the rents up to the confirmation of the sale. And in Mayfield v. Wright, 107 Ky., 530, 21 R., 1255, 54 S. W., 864, which was a similar suit, the court placed the land in the hands of a receiver, and it was rented out. The widow and children were held entitled to the rents. These cases are conclusive of the one before us. The land at the death of the decedent descended to his heirs. Being the owners of it, they were entitled to the rents

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until their title was divested. The creditors of the decedent, as held in the cases cited, may subject the land to their debts; but they have no lien on the rents, and the right of the heir to the rents of the property descended as long as he remains the owner is recognized by the statutory provisions. The rents are neither legal nor equitable assets of the estate.

Judgment reversed, and cause remanded for a judgment in conformity herewith.

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CASE 54—APPLICATION OF R. C. HODGES FOR A LICENSE TO RETAIL LIQUORS.—OCT. 22.

Hodges v. Metcalfe County Court.

APPEAL FROM METCALF CIRCUIT COURT.

FROM PART OF THE JUDGMENT OF THE CIRCUIT COURT APPLICANT APPEALS. REVERSED.

INTOXICATING LIQUORS—LICENSE TO RETAIL DEALERS—APPLICATION—EVIDENCE—REFUSAL—APPEAL.

Held: 1. Where an applicant for a license to retail liquors complies with all the provisions of the law, and there is no objection from any one of the legal voters in the neighborhood in which the license is to be exercised, nor any proof that the applicant is a person of bad character or will not keep an orderly and law-abiding house, it is the plain duty of the county judge to grant the application.

2. Where an appeal is taken to the circuit court from the judgment of the county court refusing to grant an application for a liquor license, the court must hear the case on a bill of exceptions only.

3. Where, on appeal to the circuit court from the refusal of the county court to grant an application for a liquor license, the bill of exceptions showed that the county court had no discretion in the matter, but should have granted the application, the circuit court should merely remand the case, with directions to grant the application.

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J. W. KINNAIRD AND J. R. BEAUCHAMP, ATTORNEYS FOR APPELLANT.

Appellant filed notice and made application in due form before the county judge for a license to retail spirituous liquors in Metcalfe county and introduced proof showing that he was qualified in all respects to carry on said business as required by the statutes.

We contend that there are only three causes for which a license of this kind can be defeated when the applicant has complied with the law.

1, "If a majority of the legal voters of the neighborhood shall protest against the application it shall be refused."

2. "Nor shall such license be granted to any person of bad moral character."

3. "Nor shall such license be granted to any person who does not keep an orderly house."

The applicant having complied with the law, and neither of these objections having been raised, we contend that he is entitled to the license as a matter of right.

The application having been arbitrarily refused by the county court, and an appeal taken to the circuit court, said court reversed the judgment of the county court in refusing the license and sent it back to the county court for a new trial.

We contend that so much of the judgment of the circuit court as remanded the case to the county court for a new trial is erroneous. Said judgment should have remanded the case to the county court with explicit direction to said court to grant the license under the facts shown in the bill of exceptions and for the correction of this error this appeal is prosecuted.

AUTHORITIES CITED.

Ky. Stats., sec. 4203, 4211, 4212; Daugherty v. Com., 14 B. Mon., 239; Thompson v. Koch, 98 Ky., 400; Helm, &c., v. Short, &c., 7 Bush, 622; Wood v. Campbell, 14 B. Monroe, 422.

COMPTON & STONE, ATTORNEYS FOR APPELLEE.

1. The bill of exceptions was not the proper practice and should not have been filed on the appeal from the county to the circuit court.

2. The case should have been tried anew in the circuit court and any new evidence pertinent to the case heard on either side.

3. The circuit court can only reverse and order a new trial.

4. If the circuit court can direct what judgment the county court should render, then the circuit court grants the license and not the county court, and the statute is violated which gives exclusive jurisdiction in such cases to the county court.

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AUTHORITIES CITED.

Civil Code, secs. 724, 726; Ky. Stats., secs. 978, 4211, 4212, 4203.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

At the January term of the Metcalfe County Court, 1903, the appellant applied for a license to retail liquor in the county by the quart, and testified and showed by the testimony of other witnesses that he had given the notice required by section 4203 of the Kentucky Statutes of 1899. No objection was made to the application, and there was no evidence that he was a person of bad character, or that he would not keep an orderly or law-abiding house. The county judge, on this showing, refused the license, and, his motion for a new trial having been overruled, appellant prosecuted an appeal on a bill of exceptions to the Metcalfe Circuit Court. Upon the trial of the appeal in that court, it was found that appellant had complied with all of the statutory provisions, and a judgment was entered reversing the judgment of the county court, and remanding the proceeding with direction "to grant appellant a new trial, consistent with the judgment and according to law." The appellant objected to so much of this judgment as directed the county court to grant a new trial, and appeals to this court, and insists that the circuit judge should have remanded the cause, with directions to issue the license.

The duty of granting licenses to sell liquor by retail is imposed by section 4203 of the Kentucky Statutes of 1899 upon the county judge; and it provides that it shall not be granted, until ten days' notice shall have been given of the application, and, if a majority of the legal voters of the neighborhood protest against the granting of the license, it should be refused. It also provides that

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no license shall be granted to a person of bad character, or who does not keep an orderly and law-abiding house. In numerous decisions of this court, it has been held that, where there is a conflict in the testimony, the county judge has a large discretion as to granting licenses of this character, and that his action will not be interfered with unless manifestly erroneous. But we have here a case in which the applicant has complied with all the provisions of the statute, and there is no objection, so far as the record shows, from any one of the legal voters in the neighborhood in which the license is to be exercised. Nor is there any proof that the applicant is a person of bad character, or that he will not keep an orderly and law-abiding house. The discretion of the county judge is not an arbitrary one in such cases, and must not be the result of mere caprice or prejudice, either against the applicant, or the business in which he proposes to engage. Under the showing made in this case, we are of the opinion that it was the plain duty of the county judge to have granted appellant's application.

Where an appeal is taken to the circuit court from a judgment of the county court refusing the application, the circuit court must hear the case, not *de novo*, but on a bill of exceptions. See Thompson v. Koch, 98 Ky., 400, 17 R., 941, 33 S. W., 96; Hensley v. Metcalfe County Court, 25 R., 204, 74 S. W., 1054; Merideth v. Commonwealth, 25 R., 455, 76 S. W., 8. The circuit judge did not err in refusing to hear the testimony not contained in the bill of exceptions, as in that event a different state of facts might have been shown in the circuit court from what was shown on the original hearing. The circuit judge also properly reversed the judgment of the county court, but it erred in remanding the case for a new trial. Appellant should not again be required to incur the trouble and expense of another trial

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in the county court, in which a different state of fact might be shown to exist, and a different conclusion authorized. The case should have been remanded with directions to the county court to grant appellant's application, as required by the statute.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

CASE 55—ACTION BY J. MORGAN GENTRY AGAINST THE CITY OF LEXINGTON TO RECOVER FEES AS JAILER OF FAYETTE COUNTY.—OCT. 22.

City of Lexington v. Gentry.

APPEAL FROM FAYETTE CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. JUDGMENT MODIFIED.

CITY—KEEP OF PRISONERS—LIABILITY TO JAILER.

Held: 1. Under Kentucky Statutes, 1899, section 1730, fixing the liability of a city for the keep of prisoners confined for a breach of the by-laws or ordinances of a city and for the violation of a statute where the city gets the benefit of a fine, and section 3155, providing that all fines and penalties collected in a police court shall be for the benefit of the city, a city is liable for the keep of all prisoners convicted in the police court where there is a fine imposed and the prisoners are sent to the county jail, though section 3151 forbids prisoners for whose maintenance the city would be liable from being confined except in the city workhouse.

2. A county jailer can not refuse to receive prisoners committed to his custody by a judgment of the police court of a city, where the court had jurisdiction to try the offense and of the person charged therewith, though the commitment should have been to the city workhouse.

3. A city is not liable to the sheriff of the county for the keep of prisoners committed to his care either for appearance or under sentence when a fine constitutes no part of the punishment, un-

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der Kentucky Statutes, 1899, section 1730, making the city liable for the keep of prisoners where it gets the benefit of a fine.

W. S. BRONSTON, CITY SOLICITOR, FOR APPELLANT.

To sum up our conclusion on the question involved, we find:

1. Under section 143 of the Constitution a police court is established.

2. It has penal jurisdiction concurrent with the magisterial courts.

3. This jurisdiction is limited to a fine not to exceed $100, and imprisonment not exceeding fifty days in jail.

4. The judge of the police court in cities of the second class sits in a dual capacity: (1) To enforce the statutory law within the limits of the city, or to sit as an examining court for offenses committed within the city limits; (2) as a judge of the city to punish infractions against the by-laws and ordinances.

5. Section 3151, Kentucky Statutes, says that all persons convicted in said police court shall be sent to the city jail or workhouse; otherwise, the conclusion follows that the city, receiving no benefit from their confinement in the county jail, shall not be liable for the expense of their board and keeping.

6. The mittimuses under which the prisoners were sent to the courts were signed by the clerk of the police court who had no authority to sign them and conferred no authority on the jailer to receive them.

7. If appellee's contention be sustained in the coming years, cities of the second class will be crushed with the enormous expense in maintaining a city prison and workhouse with a jailer and assistants, and in addition be compelled to pay the county jailer for keeping all the prisoners convicted in the police courts of these cities.

GEORGE C. WEBB, ATTORNEY FOR APPELLEE.

The facts admitted in this case are:

1. That appellee is jailer of Fayette county and has served from January 1, 1898, to January 1, 1902.

2. That during said time a large number of persons were brought before the police court of the city of Lexington in said county, and in default of bail, or upon final conviction, were sent by the court to be confined in the county jail.

3. These orders of commitment ran in the name of the Commonwealth when the offense was against the Commonwealth, and in the name of the city of Lexington when in violation of the city laws.

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4. That appellee received and kept said prisoners in the county jail.

We contend that under the law the city is liable for the keep and diet of prisoners in two cases:

1. When confined for a breach of the by-laws or ordinances of the city.

2. When confined for a violation of a statute where the city gets the benefit of the fine.

AUTHORITIES CITED.

Constitution, sec. 143; Ky. Stats., secs. 1093, 1730, 3155; Vanfleet on Collateral Attack, sec. 3; Shackelford v. Miller, 9 Dana, 277; McIlvoy v. Speed, 4 Bibb, 85.

OPINION OF THE COURT BY JUDGE BARKER—REVERSING.

The appellee, J. Morgan Gentry, instituted this action in the Fayette Circuit Court to recover of the city of Lexington (a city of the second class) the sum of $436.50, the aggregate amount of fees claimed to be due him as jailer of Fayette county, for the keep of certain classes of prisoners committed to his custody by the police court of Lexington. The validity of this claim depends upon the construction of the following sections of the Kentucky Statutes:

Section 1730: "The fees of the jailer shall be as follows: . . . For keeping and dieting prisoners in jail, when confined for an offense other than a felony or contempt of court, fifty cents per day; to be paid out of the county levy, unless confined for a breach of the by-laws or ordinances of a city or town, or for the violation of a statute, where the city or town gets the benefit of the fine; in that case to be paid by such city or town. For imprisoning and releasing a prisoner charged with a misdemeanor, sixty cents, to be paid out of the county levy, unless confined for a breach of the by-laws or ordinances of a city or town, or for a violation of statute, where the city or town gets the benefit of the fine; in that case to be paid by such city or town. . . ."

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Section 3147: "Said court (police court of cities of the second class) shall have exclusive original jurisdiction in all prosecutions for the violation of the ordinances of the city, and jurisdiction concurrent with the circuit court and justices of the peace of all pleas of the Commonwealth arising within the limits of the city, except cases of felony; and said court shall have power and authority to take recognizances from persons charged with offenses recognizable before said court, to appear and answer the same as the circuit courts have, and a like power to enforce compliance with the same, and as to committing criminal offenders and sending them on for trial. Said court shall have all power given by the general law to examining courts."

Section 3151: "That all persons committed by said court for default of surety for good behavior or to keep the peace, and all others whom the city is bound to maintain when committed to jail, shall be confined in the city workhouse or prison, and they may be compelled to labor as many days, at such sum per day as may be necessary to defray the reasonable cost of their board, to be, from time to time, determined by the mayor and general council."

Section 3155: "All fines and penalties and costs collected in the police court shall be for the use and benefit of the city, and the officer collecting such fines and penalties shall make daily reports of such collections to the treasurer, taking duplicate receipts therefor, one of which shall be delivered to the auditor."

Appellee, in his petition, sets out an itemized account of his claim, showing the names of the prisoners, the offenses with which they were charged, and of which they were convicted, and the number of days they were kept in jail. For appellant it is contended that section 3151 forbids prisoners, for whose maintenance and keep the city would be liable

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under section 1730, from being confined, except in the city workhouse or prison, and therefore it is not responsible for the maintenance of any prisoners confined in the county jail. Appellee contends that, as the jailer of Fayette county, it was his duty to receive and keep any prisoners committed to his custody by order of the police court, and that he could not look behind the order of commitment; that, having kept the prisoners in question, and been put to the expense of their maintenance, he is entitled to a judgment for the whole claim sued for.

Section 1730 fixes the liability of the city for the keep of prisoners confined for a breach of the by-laws or ordinances of a city or town, or for the violation of a statute, where the city or town gets the benefit of the fine; and section 3155 provides that "all fines and penalties and costs collected in the police court shall be for the use and benefit of the city." It is therefore clear that the city is liable for the keep of all prisoners convicted in the police court, where there is a fine imposed, unless section 3151 protects it from such liability. Section 2226 of the Kentucky Statutes provides that "the jailer of each county shall receive and keep all persons in the jail who shall be lawfully committed thereto, until they are lawfully discharged. He shall treat them with humanity, and furnish them with proper food and lodging during their confinement. . . ." Where the court has jurisdiction of the subject-matter and of the person, the judgment can not be questioned collaterally, and therefore the jailer could not refuse to receive prisoners committed to his custody by a judgment of the police court, where the court had jurisdiction to try the offense and of the person charged therewith. He could not go behind the judgment, and determine that the court should have sentenced the prisoner to confinement in the city workhouse.

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While we are of opinion that section 3151 clearly requires the court to sentence all prisoners for whose keep the city is liable to the city workhouse, still this was a matter wholly beyond the control of appellee, and, as these prisoners were sentenced to confinement in the city jail, and were kept by him, as it was his duty to do, the provision of section 1760 fixes the liability of appellant to appellee. But there are a large number of prisoners for whose keep appellant was made liable by the judgment for which it was not responsible. An examination of the itemized account of appellee's claim shows that many of the prisoners were charged with and convicted of offenses which are not punishable in whole or in part by fine. Section 1730 makes the city liable for the keep of prisoners only in cases where it gets the benefit of the fines, it being doubtless assumed by the Legislature that in the aggregate the fines collected would remunerate the city for the cost of the keep of the prisoners; but it was not intended that the city should be liable for the keep of any prisoners where from the nature of the case it could not, in any way, be remunerated. Appellee's account shows that many of the prisoners were charged with petit larceny, an offense for the punishment of which a fine constitutes no part, and therefore the city, under the provisions of section 1730, is not liable for their keep by the county jailer, when in his custody either for appearance or under sentence. The same conclusion applies to vagrancy, fugitives from justice, and to all statutory misdemeanors for the punishment of which no fine was or could be imposed. The trial judge should have disallowed the claim of appellee to the extent herein indicated.

Wherefore the judgment is reversed for proceedings consistent with this opinion.

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CASE 56—RULE ON MOTION OF HENRY STUM, &C., INFANT HEIRS OF A. M. STUM, DECEASED, TO COMPEL THE ADMINISTRATORS OF L. H. STUM AND EMMA STUM TO PAY INTO COURT CERTAIN SUMS RECEIVED BY THEM UNDER A JUDGMENT AGAINST A. M. STUM.—OCT. 22.

Stum's Admr. v. Stum, &c.

APPEAL FROM OHIO CIRCUIT COURT.

JUDGMENT FOR PLAINTIFFS AND DEFENDANT APPEALS. REVERSED.

FINAL JUDGMENT—JUDGMENT ON RULE—RES JUDICATA.

Held: Land having been sold under a judgment, and paid for, the judgment was afterwards vacated, a new trial ordered, the sale set aside, and the purchaser adjudged to have a lien on the land for the price paid. The petitioners for the new trial took out a rule requiring a party in the action to pay into court the sum received by him under the judgment. A demurrer to the rule was sustained on the ground that the part of the order adjudging a lien on the land was interlocutory, and the petitioners were not affected thereby. HELD, That this decision, though erroneous, was final, and effective in bar of a later rule for the same purpose.

BEN D. RINGO, W. A. WICKLIFFE AND E. D. GUFFY, FOR APPELLANTS.

POINTS DISCUSSED AND AUTHORITIES CITED.

1. Administrators should file their accounts of settlement with the county judge in the counties where they are appointed. Ky. Stats., sec. 978.

2. Settlements of administrators are to be recorded by the clerk when approved by the judge of the county court, and when recorded become prima facie evidence between the parties in interest. Ky. Stats., sec. 1076; 12 B. M., 515.

3. Where exceptions are filed in the county court an appeal may be prosecuted to the circuit court of the county; where no exception has been filed in the lower court, then the remedy by suit in equity in the circuit court of the county to surcharge the settlement. Ky. Stats., sec. 978; Scott's Heirs v. Kennedy's Exr., 12 B. M., 515; Turley v. Barnes, 19 L. R., 1808; Belle v. Henshaw, 91 Ky., 430.

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J. S. GLENN, ATTORNEY FOR APPELLEES.

PROPOSITIONS DISCUSSED.

1. Limitations did not run against the claim on which appellee recovered judgment on rule against appellant, Miller, because Miller was a party to suit for a new trial to vacate old judgment and to the actions as consolidated and was bound by the judgment in either case after the consolidation, and the court in these consolidated cases had the power to afford adequate and proper relief to all parties.

2. Even if the statute be held to apply it did not begin to run until the judgment granting a new trial was rendered, and the running of the statute was suspended, pending an appeal from that judgment, which judgment was superseded and judgment on the appeal became effective November 9, 1898, less than five years before issual of the rule complained of here was rendered. Johnson v. Barnes, 4 S. W., 176 (Ky.).

3. The plea of former adjudication can not avail, because the judgment attempted to be plead in bar was heard on demurrer and not on the merits of the case. The rule set up was issued against appellant in 1896 and was premature as appeal was taken from that judgment and supersedeas issued.

After that judgment the action was referred to a commissioner to report *de novo* on claims against A. M. Stum's estate, and Miller could not have been compelled to pay back what he had collected on alleged claims, until it had been determined that he had no valid claims against A. M. Stum's estate, and this determination or judgment was not made until after 1900.

4. The plea of the statute is insufficient because the court can not determine from the pleading when it is alleged that the statute began to run.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

A. M. Stum died intestate, a resident of Ohio county, previous to the year 1890, and D. B. Roll was appointed his administrator. Roll, as administrator, on November 5, 1891, filed a suit in the Ohio Circuit Court for the settlement of the estate. The debts were reported to be $2,194.57, and at the May term, 1892, a judgment was entered to sell the land of the intestate for the payment of the debts. The sale was made in August, 1892, L. A. McDaniel being the purchaser at the price of $2,261.02. At the following December term

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the sale was reported to the court, exceptions were filed to it, but they were overruled, and the sale was confirmed. In the meantime, on November 5, 1892, H. A. Stum, who was the guardian for two of the infant children of the intestate, filed for them in the Ohio Circuit Court a petition for a new trial in the action and to set aside the judgment entered at the May term. He made defendants to his petition D. B. Roll, who, as administrator, was plaintiff in the former suit, and J. S. Miller, who, as administrator of L. H. Stum, had been allowed a claim of $800 by the judgment, and as administrator of Emma Stum a claim of $498. Issue was joined on the allegations of the petition in the suit for new trial, and on November 30, 1895, the case was submitted in the circuit court. The court adjudged in favor of the plaintiffs, granting a new trial. At the March term, 1896, a rule was taken out against Miller, as administrator of L. H. Stum, also as administrator of Emma Stum, to pay into court the amount he had received under the judgment which had been set aside. He filed a response to this rule, pleading, in effect, that he had been appointed by the Muhlenberg County Court; that he had settled his accounts in that court, and had paid out the amounts in his hands to the persons entitled thereto; and that his settlement had been confirmed by the court long before the rule was taken out. He also filed a demurrer to the rule. On March 21, 1896, the court sustained the demurrer to the rule, and discharged it. No ruling was made on the sufficiency of the response. On April 27, 1896, Miller, McDaniel and Roll sued out in this court an appeal from the judgment granting a new trial and setting aside the former judgment, and McDaniel and Roll executed supersedeas bonds and sued out a supersedeas, but Miller took out no supersedeas. On May 31, 1898, the appeal was heard in this court, and the judgment appealed from was affirmed. See Roll

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v. Stum, 20 R., 661, 46 S. W., 223. After the new trial was granted, litigation ensued between McDaniel, the purchaser of the land, and the infant children of the intestate, as to whether McDaniel was entitled to a lien on the land for the purchase money which he had paid, and on December 18, 1901, it was held by this court that he was entitled to a lien for his purchase money. See McDaniel v. Stum's Adm'r, 23 R., 1935, 65 S. W., 800. On June 23, 1902, the infants, by their guardian, sued out an appeal in this court from the judgment of November 30, 1895, on the ground that it was erroneous as to them in certain particulars. This appeal was heard by this court, and the judgment was affirmed on June 9, 1903. Stum v. Roll, 25 R., 208, 74 S. W., 1115. In the meantime, on May 20, 1902, another rule was taken out on the motion of the infants or their representative against Miller, as administrator, to pay into court the amounts received by him as administrator under the original judgment. In response to the rule he pleaded the judgment of the former rule in bar. He also pleaded the five-year statute of limitations, and set up, as before, that he had paid out the money in the year 1893 to the heirs and distributees of the estate, and had settled his accounts; that his settlement had been confirmed, and he had been discharged by the Muhlenberg County Court in the year 1893. The court sustained a demurrer to his response, and gave judgment against him for the money, with interest. From this judgment he appeals.

As to the plea in bar, we have had difficulty to determine just what was decided on the former rule. A judgment dismissing a proceeding on the ground that it is premature does not bar another action. On the contrary, a judgment on demurrer that certain facts do not constitute a cause of action is as effective in bar of another proceeding as a judgment where the same facts are shown by evidence on the final

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hearing of the case. Freeman on Judgments, section 267. The rule was in the usual form. The judgment on the rule is in these words: "This cause having been submitted on the demurrers of defendants, D. B. Roll, administrator of A. M. Stum, deceased, and J. S. Miller, administrator *de bonis non* of the estate of L. H. Stum, deceased, and also administrator *de bonis non* of the estate of Emma Stum, deceased, to the rules herein against them, and on the motion of Henry and Annie Stum, by their guardian, H. A. Stum, for a judgment for costs on the petition for a new trial, and the court being now sufficiently advised, and being of the opinion that so much of the judgment entered herein at a former term of this court in Order Book No. 40, at page 347, as adjudges to L. A. McDaniel, the purchaser of the land heretofore sold in this action, a lien on the land for the amount of the purchase money paid by him, with interest from the date of its payment, is merely an interlocutory order, and as such is not final or conclusive as to any of the parties to this action, and this court being now of the opinion that the infant defendants herein are not affected by said part of said judgment, it is now considered and adjudged therefore, that each of said demurrers to said rules be, and the same is now hereby, sustained, and each of said rules is now discharged, and the defendants, D. B. Roll, administrator of A. M. Stum, deceased, and J. S. Miller, administrator *de bonis non* of the estate of L. H. Stum, deceased, and administrator *de bonis non* of Emma Stum, deceased, recover their cost in and about said rules expended against H. A. Stum, guardian of Henry and Annie Stum; to which said H. A. Stum, guardian as aforesaid, excepts." The power of a court of equity to compel one by rule to make restitution of money received under a judgment which has been vacated, while the action is still pending, and the parties are before

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it, is undoubted, and the demurrer does not seem to have been sustained by the court on but one ground, and that was that, admitting all of the facts shown by the record, including the receipts of the money under the judgment and its vacation, still appellant was not liable to a rule by the infant defendants because they were not affected by that part of the judgment. In other words, the idea of the court seems to have been that McDaniel had no lien on the land, and that the judgment giving him a lien was not final, but interlocutory, and that the infants, having gotten their land back, were not entitled also to have the proceeds of the sale of the land, and therefore he discharged the rule; for, after reciting that the former order as to McDaniel's lien on the land was not final, the judgment reads: "And this court being now of the opinion that the infant defendants herein are not affected by said part of said judgment, it is now considered and adjudged, therefore, that each of said demurrers to said rules be, and the same is hereby, sustained," etc. The infants were seeking relief both against McDaniel and appellant. They were not entitled to both the land and its proceeds. The court adjudged them the land free of lien, and refused, therefore, to give them a judgment against appellant for the proceeds. It was simply a case of the plaintiffs suing two defendants and recovering against one, and losing as to the other. McDaniel appealed from the judgment against him, and reversed it, but the infants took no appeal from the judgment in favor of appellant, and that judgment is still in force. The rule was not dismissed because it was premature. No appeal had been taken at the time from the judgment on which it was based, and therefore no supersedeas was in the way. The fact that appellant's claims had not then been finally passed on did not give him any right to keep the money which had been paid to him. This was not set up as a defense in the response,

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and it sufficiently appears from the judgment of the court that it was not based on this ground, but on the ground that the infants had gotten the land, and could not get both the land and the purchase money. Although this judgment was erroneous, it is a final judgment, and it is none the less a bar to another rule against appellant because it was based on erroneous grounds. Appellees' remedy was by appeal. If the rule were otherwise, a new proceeding might have been instituted the next day. The court did not mean to leave the matter at large. It was not a dismissal of the rule without prejudice, but a judgment on the merits.

We therefore conclude that the judgment on the former rule is a bar to this proceeding, and the judgment is reversed, with directions to dismiss the rule.

Petition for rehearing by appellee overruled.

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CASE 57—J. M. LEAK WAS ARRESTED FOR THE OFFENSE OF BETTING ON AN ELECTION.—OCT. 23.

Commonwealth v. Leak.

APPEAL FROM SIMPSON CIRCUIT COURT.

DEMURRER TO THE WARRANT SUSTAINED AND THE COMMONWEALTH APPEALS. AFFIRMED.

BETTING ON ELECTION—OFFENSE—WARRANT CHARGING CRIME—SUFFICIENCY.

Held: 1. A bet on the result of an election, made after the holding of the election and after the announcement of the result, is not a violation of Kentucky Statutes, 1899, section 1975, punishing the betting on any election held under the State or Federal Constitutions.

2. A warrant charging defendant with having on November 20, 1901, bet on the result of the election for Governor on November 7,

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1901, is fatally defective, in the absence of a specific allegation that the result of the election was not known, where, as a matter of fact, no election for Governor was held in 1901, and the last election preceding the issuance of the warrant, in 1902, was held in 1900, as it will be presumed that the result of the election had been determined and announced at the time of the alleged bet.

L. B. FINN AND C. J. PRATT, FOR COMMONWEALTH.
(No briefs.)

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—AFFIRMING.

The Commonwealth appeals in this case from a judgment of the Simpson Circuit Court sustaining a general demurrer to the following warrant: "Commonwealth of Kentucky. To the Sheriff or Any Constable of the County of Simpson, or Marshal of the City of Franklin, State of Kentucky: It appearing from the sworn statements of J. H. Durbin that there are reasonable grounds for believing that J. M. Leak has committed the offense of betting on an election held, under the Constitution and laws of the State of Kentucky, in Simpson county, Kentucky, committed as follows, to-wit: The said Leak heretofore, to-wit, on the 20th day of November, 1901, in said county of Simpson, and State aforesaid, did unlawfully and willfully bet and wager money of the value of fifty dollars (his own) with one John Durham upon the election for Governor which was held in and for the State of Kentucky, under the Constitution and laws of the said State, on November 7, 1901, wherein William Taylor was the Republican candidate for said office of Governor, and William Goebel was the Democratic candidate for said office of Governor. Said money ($50) as aforesaid was wagered against an equal amount ($50) which was bet by the said Durham as aforesaid. Done as aforesaid against the peace and dignity of the Commonwealth of Kentucky. You are therefore commanded to arrest the said Leak forthwith, and

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bring him before me, or some other magistrate of Simpson county, to be dealt with as the law directs. Witness my hand, as judge of the Simpson County Court, this 3d day of February, 1902. W. S. McClanahan, Judge, S. C. C." This warrant was issued for a violation of section 1975 of the Kentucky Statutes of 1899, which reads as follows: "If any person shall wager or bet any sum of money or anything of value upon any election under the Constitution and laws of this Commonwealth, or the Constitution and laws of the United States, he shall be fined one hundred dollars, to be recovered in any county where the party so offending may be found, or where the bet is made." A general demurrer having been overruled, a trial of the defendant under this warrant before the county judge resulted in his conviction, and the infliction of the fine of $100. An appeal was prosecuted by the defendant from the judgment of the county court to the circuit court. Upon the trial of the demurrer in the circuit court, it was held that the facts recited in the warrant did not constitute an offense. In that court the demurrer was sustained and warrant dismissed, and the commonwealth has appealed.

Section 27 of the Criminal Code requires that the warrant of arrest should, in general terms, describe the offense charged to have been committed, and the city or county in which it was committed. And section 124 of the Criminal Code requires that an indictment should be direct and certain as regards the party, the offense, the county, and the particular circumstances of the offense charged, if they be necessary to constitute a complete offense. Encycl. of Pl. & Pr., p. 404, says: "An indictment for betting on an election should state the purpose for which the election bet on was held, and the date of the election, and that it would be sufficient if the indictment charged that the bet was made

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before the result of the election was known, and that it would be sustained by evidence that the bet was made after the election, but before the result was known." In Lewellen v. State, 18 Tex., 538, it was held that a charge that defendant on the 1st day of August, 1844, "bet money upon the result of an election ordered and held in Fayette county, according to law, for the election of a clerk of the district court of Fayette county, in the State of Texas," does not sufficiently specify the time of the election, while the charge that defendant bet that R. would be elected Governor of Pennsylvania, under the Constitution and laws of that State, on the 9th of October in the year 1838, sufficiently alleges the time of the election. See Sherban v. Commonwealth, 8 Watts, 212, 34 Am. Dec., 460. The section of the statute on which the warrant was issued was before this court in the case of Commonwealth v. Avery, 77 Ky., 625, 29 Am. Rep., 429, and it was held there to be a violation of the statute if the bet was made after the election had been held, but before the result had been declared. In that case the defendant relied upon State v. Mahan, 2 Ala., 340, as authority for the position that a bet made after the election on the result thereof was not against the statute. In commenting upon this case, the court said: "The conclusion reached by the court appears to be a correct one, but not for the reason assigned. The demurrer should have been sustained because the indictment showed that the election had been held two months prior to the time the bet was made, but it did not charge that the result was unknown to the parties at the time the bet was made. After such a lapse of time, in the absence of any express allegation to the contrary, the result of the election would be presumed to be known to the parties. In that case there could be no offense against the letter or spirit of the statute."

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There is some conflict, but the great weight of the authorities is to the effect that a bet made after the election had been held, and the result finally ascertained and announced, is not a violation of either the letter or spirit of the statute. But if the result of the election has not been distinctly ascertained and determined, it is a violation of the statute, even if the bet was made after the day on which the election was held. The same technical strictness is not required in a proceeding by warrant as by indictment, and ordinarily a warrant in the form prescribed by the Code sufficiently describes the offense; but, if made to appear to the satisfaction of the court that a defendant can not intelligently make defense, it should be made more specific. But when, as in this case, the facts recited in the warrant show conclusively that no public offense has been committed, the trial court properly sustained a demurrer. No election was held for the office of Governor on the 7th of November, 1901, nor were William Taylor and William Goebel candidates for Governor at that time. The last election for the office of Governor preceding the issual of the warrant, on the 3d of February, 1902, was held in 1900; and, in the absence of a specific allegation to the contrary, the court properly presumed that the result of the election had been ascertained and determined.

For reasons indicated, the judgment is affirmed.

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CASE 58—ACTION BY CALVIN I. HURT AGAINST THE L. & N. R. R. CO. FOR PERSONAL INJURIES.—OCT. 23.

Hurt v. Louisville & N. R. R. Co.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS BRANCH, FIRST DIVISION.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

MASTER AND SERVANT—NEGLIGENCE—NEW TRIAL—DISCRETION OF TRIAL COURT—QUESTION FOR JURY—SCINTILLA OF EVIDENCE.

Held: 1. Rulings on motions for new trial will not be disturbed unless it appear that the discretion of the court has been abused.

2. Where the trial judge is convinced that the verdict has been returned either under a misunderstanding on the part of the jury, or because of prejudice or other undue influence, it is his duty to set it aside.

3. Plaintiff mounted a moving car and attempted to set the brake, when "something slipped or gave way," and he fell in front of the car. There was evidence in an action for the injury that he was using a brake stick, contrary to the rules of the company. HELD, That it was proper not to submit to the jury the question of negligence in delivering the car at a dangerous rate of speed, since, if the brake was in proper condition, the speed could not have caused the injury, and, if defective, the speed was immaterial.

4. A brakeman was giving a brake wheel a hard turn, when "something gave way," and he fell and was injured; and it was his theory that the brake chain was too long, so that it lapped on itself, and, when he put the force on, the chain slipped. There was no evidence that the brake was defective, but one witness testified he examined a car which had been pointed out by "some railroad employes" on the following day, and that one of the links of the brake chain was pressed together. HELD, That there was a scintilla of evidence, requiring the case to go to the jury.

5. A verdict is not to be sustained upon a mere scintilla of evidence, where it is flagrantly against the weight of all the evidence.

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6. In a servant's personal injury action, where the circumstances show nothing as to the real cause, but leave it to conjecture whether it was the negligence of the master, the fault of the injured servant, or an unaccountable accident, there is a failure of proof.

BENNETT H. YOUNG AND EDWIN C. WAIDE, ATTORNEYS FOR APPELLANT.

This is the third trial of this case. On the first trial there was a hung jury. On the second trial on precisely the same evidence that was heard on the last trial, the jury returned a verdict for the plaintiff for $10,000 damages, which was set aside by the court. On the third and last trial nine of the jurors returned a verdict for the defendant and of this verdict and the judgment of the court thereon, as well as on the judgment of the court in setting aside the verdict in favor of the plaintiff on the second trial, this appeal is prosecuted.

The plaintiff in setting a brake on one of appellee's cars which he was required to do, by some defect in the appliances, as he claims, was thrown from the car and injured by the loss of one leg, one arm and one eye.

The appellant contends:

1. The order setting aside the verdict and judgment of May 3, 1901, and granting the defendant a new trial was erroneous.

2. The instructions given by the court on the last trial did not embrace the law of the case.

AUTHORITIES CITED.

Crowley v. L. & N. R. R. Co., 21 R., 1434; Richards v. L. & N. R. R. Co., 21 R., 1478; L. & N. R. R. Co. v. Ricketts, 21 R., 662; Meek v. McCall, 12 R., 796; Curry v. Fetter, 16 R., 494; Legrand v. Baker, 6 Mon., 236; Am. & Eng. Ency. of Law, vol. 16, p. 554; Evening Post v. Richardson, 24 R., 457; Chapman v. McCormick, 96 Ky., 479; M. K. & T. v. McGlenny, 89 Tex., 635; O'Niel v. Dry Dock Co., 129 N. Y., 125; Manin v. Dennison, 78 Cal., 202; Richmond & D. R. Co. v. Barrett, 88 Va., 538; Snowden v. Waterman, 106 Ga., 384; Plattsmouth v. Boeck, 32 Neb., 297; Wilmott v. Corregan, C. S. Co., 106 Mo., 535; City & Sur. R. Co. v. Findley, 76 Ga., 311; Earl Fruit Co. v. Curtis, 116 Cal., 632; Bailey v. Tygart Valley Iron Works, 10 R., 677; Anniston Lime & Coal Co. v. Lewis, 107 Ala., 535; Hermany v. Globe Foundry Co., 112 Mich., 616; Eureka Tent Co. v. Bolt Cap Smith Co., 78 Md., 179; Holms v. Whittaker, 23 Ore., 319; Chappel v. Trent, 90 Va., 849; Gamble v. Mullin, 74 Iowa, 99.

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HELM, BRUCE & HELM, FOR APPELLEE.

AUTHORITIES CITED.

1. A new trial will often be granted where it would be improper to give a peremptory instruction in advance of the trial. Buford v. L. & N. R. R. Co., 82 Ky., 287.

2. The appellate court is less inclined to disturb the action of the circuit court in *granting* a new trial than in *refusing* one. Reliance Textile & Dye Works v. Mitchell, 24 Ky. Law Rep., 1286; E. H. Taylor, Jr. & Sons v. Louisville Public Warehouse Co., 24 Ky. Law Rep., 1656, 1659.

3. Mere proof of injury, with attending circumstances showing that the party charged with neglect may be blameless or may be at fault will not do. Hughes' Admr. v. Cincinnati, &c., Ry. Co., 91 Ky., 531; Louisville Gas Co. v. Kaufman, Straus & Co., 105 Ky., 156; L. & N. R. R. Co. v. Wathen, 22 Ky. Law Rep., 85; Illinois Central R. Co. v. Gholson, 23 Ky. Law Rep., 2210.

4. Mere proof of negligence, without proving that such negligence caused the injury complained of, is immaterial. Wintuska's Admr. v. L. & N. R. R. Co., 14 Ky. Law Rep., 580.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

Appellant was a member of a switching crew in appellee's yard at Louisville. A flat car loaded with railroad rails was "kicked" or turned loose with a strong shove from the locomotive, down a track that crossed a public street. It was appellant's duty to mount this car as it passed him, and to set the brake so as to stop it within a reasonable distance. In setting the brake, appellant fell or was thrown from the car, falling in front of it, and lost two of his limbs, and was otherwise hurt. This suit charged that the injury was because of the gross negligence of appellee's agents in charge of the locomotive in delivering the car at a too rapid rate, and in the failure of appellee to provide the car with a safe brake. The car was turned loose, when going, appellant testified, at eight or ten miles an hour. Witness for appellee said at two to six miles an hour. Others thought it was more than ten miles an hour, while some expert witnesses,

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who were not present at the time of injury, thought, from the distance the car traveled before stopping, that it was from twelve to twenty miles an hour. Appellant made two efforts to set the brake. The first time he thought it was set tight enough, but, finding it was not, and probably because of a command of some one to stop the car, he attempted to set it tighter. He says that, as he swayed his body forward and outward to give the brake wheel the necessary turn, "something slipped or gave way," and he fell in front of the moving car. He did not know what it was that slipped or gave way. He had not previously examined the brake or the car, nor had opportunity to, so far as was shown, and did not afterward examine it. The brake was an upright iron rod, extending about three feet above the platform of the car, and surmounted with an iron wheel used in turning it. It extended below the platform. A chain was attached to the lower end, and connected with a horizontal rod attached to the brake beam. As the brake wheel was turned, the chain was wound around the upright rod, thereby shortening the chain and drawing the brakes against the wheels. Appellant said that he thought—and that is his theory of the cause of the accident—that this chain was too long, and lapped upon itself, partially, in the setting up of the brake, and, when he put the extra force on the wheel to set it tighter, the chain slipped off the lap, whereby he was given an unexpected lurch forward and was thrown, as stated. If the chain was so long as to permit it to overlap, or "ride" itself, it is claimed that it was an unsafe provision, and that allowing it to be so was negligence on the part of the company. A number of persons inspected the car and the brake immediately after the accident—within a few minutes—and while it was in the same condition as it was when the injury occurred. They all

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testified that the chain was not too long, and was in perfect order. The brake was set up, and worked properly. There were three trials of the case. At the first trial the jury disagreed. Upon the second trial the jury returned a verdict for appellant in the sum of $10,000. A motion was made by the company for a new trial, based upon numerous grounds—among others, that the verdict was flagrantly against the weight of the evidence, and that the verdict was excessive. The court granted a new trial, but upon which of the grounds, the record does not show. Upon the third trial, upon substantially the same evidence and under practically the same instructions, the jury found for the defendant (appellee). Appellant's motion for a new trial was overruled. This appeal seeks to reverse the action of the trial court in setting aside the verdict for $10,000 and granting a new trial of the action, and to have this court order a reinstatement of the judgment upon that verdict, or, if that is not done, then that the judgment in this case upon the verdict rendered at the last trial be set aside because the court failed to properly instruct the jury at appellant's instance.

We will first review the action of the trial court in setting aside the verdict in appellant's behalf. Appellee insisted that there was no evidence to have authorized the submission of the case to the jury at all, and that its motion for a peremptory instruction should have been sustained. The trial court, however, did not set aside the verdict on this ground, manifestly, because, upon the next trial, when the evidence was not materially different, he again refused to grant a peremptory instruction, and submitted the case to the jury. Nor was the action of the court probably based upon the complaint of the company that the court had misinstructed the jury, for upon the next trial he gave

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about the same instructions as before. His action, then, must have been based upon the ground either that the verdict was not sustained by, but was contrary to, the evidence, or that the amount of damages was excessive.

Trial courts have, and ought to have, a very liberal discretion accorded to them in the matter of passing upon grounds for a new trial; and in this, as in other matters of discretion, their judgments therein should not be disturbed, except it should appear that its exercise has been abused. The judge who presides at the trial has an opportunity, that this court can not have, of seeing the manner in which the witnesses testify, of observing the attention and conduct of the jury, and the demeanor of the parties and counsel, and of many other circumstances which might affect the verdict. He has also an opportunity, and it is his duty, to note the evidence submitted to the jury, and, while it is the province of the jury to decide the questions of fact involved in the issue being tried, yet they should not be allowed to disregard it. Where the trial judge is convinced that the evidence does not warrant the jury's verdict, and that the verdict has been returned either under a misunderstanding upon the part of the jury, or because of their prejudice, or other undue influence, it is certainly within the province of the court, as well as his duty, to set it aside. In Reliance Textile & Dye Works v. Mitchell, 24 R., 1286, 71 S. W., 425, we held: "This court is less inclined to disturb the action of the circuit judge in granting a new trial than in refusing one, for the reason that the new trial simply gives the parties another hearing, without finally settling their rights. . . . The law has wisely vested in the circuit judge a judicial discretion on this subject." Also, see, Taylor, Jr., v. Louisville Public Warehouse Co. (Ky.) 72 S. W., 20. The circuit judge, under the evidence in this case, was acting clearly within his su-

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pervisory discretion in setting aside the verdict upon the ground that it was against the weight of the evidence, and flagrantly so.

The principal criticism of the last trial is that the trial court failed to submit to the jury an element of appellee's negligence that was charged in the petition, and claimed to be justified by the evidence. The circuit court told the jury, in substance, that it was the duty of the railroad company to provide safe appliances upon the car, and that if it failed to do so, in that the brake was defective, and that it knew, or by the exercise of ordinary care might have known, of the defect in time to have remedied it before the accident, and that the injury was caused by such defect, without negligence upon the part of the plaintiff, then the jury should find for the plaintiff. The complaint is that the court failed to submit to the jury also the question whether the defendant was not negligent in delivering or sending the car to plaintiff at a reckless and dangerous rate of speed. The court declined to instruct upon this theory, because, as said in his opinion on that point, the evidence showed conclusively that appellant was not injured by the rate of speed, for he mounted the car in safety, whether it was running too fast or not. The argument for appellant at this point is that the momentum of the car, being too rapid, necessitated more force to be put upon the brake to stop it; that, at a moderate and proper speed, it could have been stopped by appellant's first effort in setting the brake; and that therefore his injury was caused by the high speed of the car. While not without some plausibility, we can not agree that this position is sound. The rate of speed of the car was not the proximate cause of the injury, according to the appellant's testimony, but it was something about the brake that slipped. If the brake had been in proper condition, the rate of speed of the

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car could not have caused the injury. On the other hand, if the brake was defective, as charged, it is not material at what speed the car was moving—whether two miles an hour or twenty miles—because, if appellant was injured by that defect, the company is liable. To have submitted to the jury the question of appellant's negligence upon the question of speed of the car would have been misleading. It might have been that the car was turned loose at a point in the city where its rate of speed was negligent to those using the street, or to one required to make a coupling of the car; but, to the brakeman who was safely upon it, there is nothing in the evidence to show that it was at all negligent. If the brake had been worked properly, and there was no other cause for the accident, appellant could not have been thrown from the car merely by the rate of its speed, nor does he claim that he was. There was evidence tending to show that appellant was using a brake stick, in violation of the rules of the company, the danger of which was well known to him. This is what might have slipped. Appellant may in some way, unaccountable even to himself, have lost his balance and fallen. At any rate, there is nothing to show that the rate of speed was the direct or proximate cause of his injury. It was therefore proper not to have submitted that question to the jury.

The plaintiff's theory of the cause of the accident, so far as the condition of the brake is concerned, is only a theory. He does not profess to know personally what was the cause. No witness testifying for him said that the brake was in any wise defective, or that it was possible for the chain to have overlapped as surmised in the theory for appellant. The witness Bashaw, who testified for plaintiff that he had examined a car which had been pointed out by "some railroad employes" on the following day, and that one of the links

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of the brake chain was pressed together, does not really identify the car, nor the relation to appellee of the person who pointed it out to him. But even if this witness' identification of the car had been satisfactory, the evidence was simply overwhelming that he was mistaken—that the chain was not defective, as stated. However, this constituted what what might be called a scintilla of evidence, requiring a submission of the question to the jury. Appellee's motion for a peremptory instruction was properly overruled. But it does not follow by any means that the rule requiring the submission of a case to the jury if there is a scintilla of evidence means that a verdict may be sustained upon a mere scintilla of evidence, where it is flagrantly against the weight of all the evidence. Before the injured servant can recover damages from his master, he must show that his injury was caused by some neglect of the master, or by some other servant of the master, which is imputed to him. It is not enough to show merely that the plaintiff sustained his injury while in the service of the master. Where the circumstances attending the injury show nothing as to the real cause, but leave it to conjecture whether it was the negligence of the master, the fault of the injured servant, or an unaccountable accident, there is a failure of proof. The cause of the injury must be proved. Unless it is shown affirmatively, there can be no recovery. Hughes v. Cincinnati, etc., Ry. Co., 91 Ky., 526, 13 R., 72, 16 S. W., 275; Louisville Gas Company v. Kaufman, Straus & Co., 105 Ky., 131, 20 R., 1069, 48 S. W., 434; L. & N. R. Co. v. Wathen, 22 R., 82, 49 S. W., 185; Illinois Central R. Co. v. Gholson, 23 R., 2209, 66 S W., 1018.

The judgment of the circuit court must be affirmed.

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CASE 59—ACTION BY WALTER MARTIN'S ADMR. AGAINST THE CUMBERLAND TELEGRAPH AND TELEPHONE CO. FOR CAUSING DEATH OF PLAINTIFF'S INTESTATE.—OCT. 28.

Cumberland Telegraph & Telephone Co. v. Martin's Admr.

APPEAL FROM LINCOLN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

ELECTRICITY — INJURIES — TELEPHONE WIRES—MAINTENANCE—NEGLIGENCE—DUTY TO LICENSEES.

Held: Deceased took refuge from an electric storm under the porch of a store. He placed his back against an iron grating over a window, and was subsequently killed by lightning which struck one of defendant's telephone poles near the store and was conducted to the porch by a wire negligently maintained over the metal roof thereof, and from the roof to the iron grating, and thence to deceased. HELD, That deceased was a bare licensee in the place where he was killed, and that defendant owed him no duty to properly maintain the wire.

WM. L. GRANBERRY AND HUMPHREY, BURNETT & HUMPHREY, ATTORNEYS FOR APPELLANT.

The deceased was killed by a stroke of lightning while sitting upon a box under the porch of a store building belonging to a man named Ike Hamilton. The store was not occupied, but deceased had gone there with others to get shelter from a storm.

The claim against the telephone company is based upon the theory that the lightning which caused Martin's death struck a wire belonging to the telephone company and following that wire passed over the end of the porch of the Hamilton store and thence into a wire screen against which the deceased Martin was leaning and through his body to the earth.

It is claimed that the telephone company owned the wire in question and was guilty of negligence in fastening it to the corner of the store.

The jury found against the Cumberland Telephone Company in the sum of $5,000.

We claim that under the instructions given by the court to the

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jury they were called upon to try a case which the plaintiff by an amended petition had withdrawn from their consideration.

We submit that the instructions are erroneous in requiring that the defendant should so put its wire upon the building as to make it reasonably safe to those who were or might be at or about the place.

The evidence had disclosed that the house was vacant, and we entirely fail to understand what duty rested upon the telephone company to make a vacant house safe for any one who might go into it without even a license from its owner.

AUTHORITIES CITED.

Lockat v. Lutz, 94 Ky., 287; Clark v. Hart, 17 R., 604; Reeves v. French, 20 R., 220; Mitchell-Tranter Co. v. Ehrnett, 23 R., 1788; Collis v. Selden, L. R., 3 Com. Pleas, 495; Blakemore v. Bristol, &c., R. Co., 8 El. & Bl., 1035; Winterbottom v. Wright 10 Meeson & W., 109; Losee v. Chute, 51 N. Y., 494; Goodlander Mill Co. v. Standard Oil Co., 63 Fed. Rep., 401; Cleveland Railway v. Ballantyne, 84 Fed. Rep., 935; Heaven & Pender Law Rep., 11 Queens Bench Dw., 512; 1 Shearman & Redfield on Negligence, sec. 8; 21 Am. & Eng. Ency. of Law, 2d ed., 510; Nolan v. N. Y., N. H. & H. R. R. Co., 53 Conn., 461; Gibson v. Leonard, 37 Ill. App., 348; Sutton v. N. Y. & H. R. R. Co., 66 N. Y., 246; Louisville Gas Co. v. Kaufman, Straus & Co., 105 Ky., 142, 156, 157; Hughes v. R. R. Co., 91 Ky., 526; Wintuska's Admr. v. R. R. Co., 14 R., 579.

W. G. WELCH AND W. G. WARREN, ATTORNEYS FOR APPELLEE.

We contend:

1. A party's liability to trespassers depends upon the former's contemplation of the likelihood of their presence on their premises, and the probability of injuries from contact with conditions existing there, and when, under the circumstances, a technical trespass may reasonably be anticipated, the owner of the premises will be liable for failure to take reasonable precautions to prevent injury to the trespasser.

2. The law in relation to the users for gain of the tremendous power of electricity is, that a telephone company, for instance, owes to the *public* the duty of so hanging and managing its wires as not to injure or kill any person anywhere who is not an actual trespasser upon the premises or property of the company *and who is not at the time conscious of the danger to which he has exposed himself.*

3. It does not lie in the mouth of the defendant company to

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say that deceased was a trespasser when the proof shows that the company itself was a continuous trespasser by the use of the storehouse where the accident occurred, against the will and protest of the owner. If deceased was a trespasser he was not a trespasser upon the defendant company. The place where he sought temporary shelter from the storm being an uninclosed porch to a storehouse on a public street, a porch with an earthen floor and roof overhead.

4. The fact as to whether there was negligence on the part of defendant company and whether that negligence was the proximate cause of decedent's death, were questions peculiarly in the province of the jury, and the jury's determination of these questions will not be set aside unless obviously or flagrantly wrong.

5. The evidence shows that the telephone wire passed almost parallel with and two and a half to four inches from the edge of the metal roof of the porch, and after the telephone box had been previously taken out of the store, then the two wires had been tied together outside and against the house by another piece of wire, leaving two projecting points, which was negligent and dangerous, and the wires in this dangerous condition were maintained there by the company against the objection and protest of the owner of the house.

6. We claim that the instructions given by the court were clear and succinct expositions of the law governing the issues presented in the pleadings.

AUTHORITIES CITED.

Thompson on Negligence, vol. 1, sec. 801, 994; Watson on Damages, p. 288; Newark Electric Light Co. v. Gordon, 78 Fed. Rep., 74; Thompson on Negligence, new edition, vol. 1, sec. 807; Ill. Central R. R. Co. v. Deck, 91 Ky., 434.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

Appellee filed this action to recover of appellant for the death of his intestate, Walter Martin, a young man twenty-five years old, charging that his death was caused by the negligence of appellant. He recovered judgment for $5,000. The only question we deem it necessary to consider on the appeal is whether the facts shown on the trial warranted a recovery. These facts are as folows:: On May 18, 1901, a dark cloud came up at Roland, Ky. The deceased, in com-

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pany with another young man and some boys, took refuge from the rain under the porch of a store building. Part of the boys entered the store, but the deceased remained on the porch, sitting on a goods box, with his back against the grating over the window. This grating ran up near the roof, and consisted of metal rods. A telephone wire belonging to appellant, as found by the jury, ran over the roof of this porch and within two or three inches of it. The roof was of metal and wet. Lightning struck one of the telephone poles about 600 yards from the porch, and, after shattering that pole and several on either side of it, was conducted by the wire to the porch, where it left the wire for the iron roof, or part of it did, and passed from the iron roof to the grating, and thence through the body of the deceased to the ground, killing him instantly. There was sufficient evidence of negligence in the way the wire was attached to the house to go to the jury if the defendant owed any duty to the deceased, or if his death was the proximate result of its negligence. The wire had been placed thus on the building in the year 1899, and there had been some complaint then by the owner about it, and there had been a promise to remove it by the person who put it there; and there was some complaint also in the year 1900, but for some months before the injury nothing appears to have been said about it. Appellant did not put the wire there, but found it on the house when it took charge, but there was evidence of notice by the owner that the wire should be removed after this. There was some conflict in the evidence, but this is as strong a statement of the facts as the proof for appellee warrants. In Pittsburg, etc., R. R. Co. v. Bingham, 29 Ohio St., 364; the deceased, being out of employment, went to the passenger station of the railway for pastime and as a place of safety during a storm. The house was negligently constructed, and by reason of this

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negligence fell during the storm, killing the deceased. The action was brought to recover for his death. The court, after pointing out that actionable negligence exists only where he whose act causes the injury owes to the injured party a duty, and referring to many cases applying this principal, held that the plaintiff could not recover. It said: "It is doubtless true that a railroad company, by erecting station houses and opening them to the public, impliedly licenses all persons to enter. But it is equally true that such license is revocable at the pleasure of the company as to all persons who are not there on business connected with the road, or with its servants or agents. An implied license to enter a depot creates no additional duty upon the part of the company as respects the safety of the building entered. Its only effect is to make that lawful which, without it, would be unlawful. Wood v. Leadbitter, 13 M. & W., 838. It is a waiver or relinquishment of the right to treat him who has entered as a trespasser." In Lary v. Cleveland, etc., R. R. Co., 78 Ind., 323, 41 Am. Rep., 572, some boys took refuge in an old freight house in a storm, and one of them was injured by the falling of part of the house. The court, after showing that the railroad company owed him no duty, applied the principle that, where there is no duty to the person injured, there is no actionable negligence. In Severy v. Nickerson, 120 Mass., 306, 21 Am. Rep., 514, a longshoreman, after loading ice on a vessel, went on it after finishing his work merely to gratify his curiosity, and while there fell down an open hatchway, negligently left open, and broke his leg. It was held that the owner of the vessel owed him no duty, and that he assumed all the risks of the place. The court said: "The distinction which exists between the obligation which is due by the owners of premises to a mere licensee, who enters thereon without any enticement or inducement, and

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one who enters upon lawful business by the invitation, either expressed or implied, of the proprietor, is well settled. The former enters at his own risk." These decisions are in accord with the entire curent of authority, both English and American. Thus in 1 Thompson on Negligence, section 946, it i ssaid: "As a general rule, the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, intruders, idlers, bare licensees, or others who come upon them not by an invitation, express or implied, but for their own purposes, or to gratify their curiosity, however innocent or laudable their purpose may be." In sections 947-952 many ilustrations of this principle are given. To same effect, see note to Godley v. Hagerty, 59 Am. Dec., 736; also note to Zoebisch v. Tarbell, 87 Am. Dec., 667; Hart v. Cole (Mass.) 31 N. E., 644, 16 L. R. A., 557; Sterger v. Van Siclen (N. Y.) 30 N. E., 987, 16 L. R. A., 640, 28 Am. St. Rep., 594. If it be conceded that the deceased was not technically a trespasser, but a licensee, still he was a bare licensee He had no business at the store. He went under the porch to get out of the rain, and remained there entirely for his own convenience. Under the above authorities, the owner of the property was under no liability to him to keep it safe. If the telephone company had owned both the building and the wire, it would not have been under any responsibility to the deceased for his injury, although he was under its porch by its implied consent, as he was there as a bare licensee, for his own convenience. If the telephone company would not be responsible if it owned both the wire and the building, it is certainly under no greater responsibility when it owned only the wire. If it had put its own wire negligently on its own building, and thus endangered its being struck by lightning, it would be responsible to those it invited to the building in a dangerous condition, but it

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would not be responsible to those merely using it for their own convenience as a shelter in a time of storm. When it put its wire negligently on another person's building, and was negligent in securing it, it violated its duty to him, but it violated no duty to those to whom neither he nor it were under any obligation. We therefore conclude, for the reasons stated, the plaintiff made out no cause of action against appellant. This conclusion makes it unnecessary for us to consider the other questions discussed.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

Dec. 18, 1903.

Judge Hobson's response to petition for rehearing by appellee:

The distinguished counsel for appellee concedes in the petition for rehearing that the facts of the case are fairly stated in the opinion. He also concedes the soundness of the authorities cited, and that if the telephone company had owned both the house and the wire it would not be responsible for the death of the intestate. But he insists that it does not follow that it is not responsible when it owned only the wire, and allowed it to remain on the building after it was requested by the owner of the building to remove it. No authority is cited by the learned counsel sustaining his contention, and he seems to misapprehend the legal principle upon which the opinion rests. This is that there can be no negligence where there is no legal duty. In 1 Shearman & Redfield on Negligence, section 8, in defining negligence, it is said: "The first element of our definition is a duty. If there is no duty, there can be no negligence. If the defendant owes a duty, but does not owe it to the plaintiff, the action will not lie. And there can be no duty to do any act which one has no legal right to do. The plain-

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tiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him." See, also, to same effect, Cooley on Torts, 659, 660. In Bishop on Non-Contract Law section 446, the rule is thus stated: "To sustain an action for negligence, the plaintiff must have suffered a legal injury whereof he is entitled to complain. Therefore, however great the defendant's negligence, if it was committed without violating any duty which he owed either directly to the plaintiff, or to the public in a matter whereof he had the right to avail himself, as explained in the earlier chapters of this volume, there is nothing which the law will redress." He who handles an agency which is of itself dangerous to human life is responsible for injuries therefrom not caused by extraordinary natural occurrences or the interposition of strangers. Thomas v. Winchester, 6 N. Y., 397, 57 Am. Dec., 455; Norton v. Sewall, 106 Mass., 143, 8 Am. Rep., 298. But as to things which are not of themselves essentially instruments of danger the rule is different, and for them the negligent party is not responsible to strangers. Loop v. Litchfield, 42 N. Y., 351, 1 Am. Rep., 513; Losee v. Clute, 51 N. Y., 494, 10 Am. Rep., 638; Blakemore v. Railway Co., 8 El. & Bl., 1035. If the telephone company had used over its wires a current of electricity which was of itself dangerous to life, a different question would be presented; but the electricity which killed the intestate came from the clouds, and was the act of God. The current which the telephone company used in its business was harmless. It owed the intestate no duty to furnish him a safe shelter from the rain. When he used the porch as a shelter, he took it as he found it. The wire of the telephone company was not in or of itself an instrumentality dangerous to human life, and there was no duty violated to the

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public in a matter whereof the intestate had the right to avail himself. Section 969 of Thompson on Negligence has reference to defects in premises which are in themselves dangerous. Sectin 807 refers to the liability of the company owning the wire to the owner of the house.

Petition overruled.

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CASE 60—ACTION BY THE LANGDON-CREASY COMPANY AGAINST THE TRUSTEES OF OWENTON COMMON SCHOOL DISTRICT TO PREVENT ITS PROPERTY FROM BEING ASSESSED FOR TAXATION FOR SAID SCHOOL DISTRICT.—OCT. 28.

Langdon-Creasy Co. v. Trustees of Owenton Common School District.

APPEAL FROM OWEN CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

TAXATION—CORPORATION—SITUS OF PERSONAL PROPERTY.

Held: Kentucky Statutes, 1899, section 4085, provides that the property of all corporations, except where differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, its chief officer shall give a full report of its property, etc. *Held*, that where a corporation engaged in the grocery business, not within sections 4077, 4078, providing for the imposition of franchise taxes on certain corporations, owned stocks of goods in various counties, its entire personal property should be assessed at the place of its residence and principal place of business.

CHAS. STROTHER, ATTORNEY FOR APPELLANT.

The sole purpose of this action is to obtain a deliverance from the court on the question of the situs for taxation of personal property belonging to a private corporation.

It is admitted for the purposes of the demurrer that the prop-

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erty assessed is a stock of groceries in Owenton, Ky., and that appellant owns similar stocks of goods located in some twenty-odd counties in this State, all of which, including the stock at Owenton, appellant lists for taxation for all purposes in Kenton county, Ky., and there pays its taxes, and we maintain that Kenton county being the legal residence of appellant, is the proper and only legal place at which it should list and pay said tax.

The law requiring railroad companies to pay taxes at the place of its legal residence and likewise in municipalities and school districts through which it runs, applies to real estate only and is true because of special provision of law.

AUTHORITIES CITED.

City of Newport v. Ringo, 87 Ky., 635; Gates v. Barrett, 2 R., 318; Milwaukee Ship Co. v. City of Milwaukee, vol. 18, L. R. A., 353.

JOHN W. DOUGLAS, ATTORNEY FOR APPELLEE.

The question in this case is: "Does the situs of personal property ever control its taxation?" Appellant owns a stock of groceries in the town of Owenton worth $900. It has "twenty or more stores" scattered over Kentucky, each of which owes its protection to the officers where it is situated.

If the contention of appellant prevails it could locate its twenty or more stores in Louisville, Lexington and other towns and cities where taxes are high, and claim its chief place of business and home at a small town like Burlington in Boone county, where very little taxes are paid, and thereby force its competitors in business to pay much more taxes than it pays, leaving it to enjoy the benefits of its location in other places without sharing the burdens thereof. The assessing officers at its "home place" could not know or estimate the value of its stock in other places, and in this way it may practice a fraud in its assessments and escape its share of the public burden.

While the situs of personal property is usually with the owner, this is not always the case, and if not always the case, surely this is one instance in which the situs will control.

AUTHORITIES CITED.

Louisville v. Tatum, Embry & Co., 23 R., 1014; Lawyers' Reports Annotated, vol. 37, p. 385, 386, 387; Herron v. Keeron, 59

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Ind., 472 (26 Am. Rep., 87); Cooley on Taxation (2d ed.), p. 374; Desty on Taxation, vol. 1, sec. 62.

OPINION OF THE COURT BY JUDGE PAYNTER—REVERSING.

The appellant is a corporation organized under the laws of this Commonwealth, and is engaged in the retail grocery business. Its residence and principal place of business is Covington, Kenton county, Ky. It also has retail grocery stores in various places of the State, including one in Owenton, Owen county, Ky. Supposing it was its duty to do so, it listed all its property in Covington for taxation. The trustees of the common school district assessed the property in Owenton for taxation. The question here is whether the stock of goods in Owenton should have been assessed there or in Covington. From the averments of the petition, this is not an effort upon the part of the appellant to evade the payment of taxes, but to prevent its property from being assessed in two places, thus being subjected to the burden of double taxation. The law requires that the articles of incorporation should designate the principal place of business of the corporation. It was held in Newport & Cincinnati Bridge Co. v. Woolley, 78 Ky., 523, that a corporation can not have two domiciles at the same time, and that it obtains a residence not by its own act, but by legal authority. From the averments of the petition, we conclude that its residence is in the city of Covington. This is not a corporation which is required to make a report to the Auditor of Public Accounts for the purpose of being assessed. Sections 4077, 4078, Kentucky Statutes, 1899; Louisville Tobacco Warehouse Co. v. Commonwealth, 20 R., 1047, 48 S. W., 420. Section 4085, Kentucky Statutes, 1899, provides that: "The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner

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as that of a natural person, except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and for failure shall be subject to the penalties by this article provided; and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation." As this corporation is not required to report to the auditor its property for assessment and taxation, it is assessed "in the same manner as that of a natural person." The property sought to be taxed is personal property, and this court in Wren v. Boske, 25 R., 1780, 72 S. W., 279, held that personal property of a taxpayer should be assessed in the county of his residence, although it was kept in another county of the State. The court went into details, pointing out various sections of the statute upon which it based its conclusion that the situs of personal property for the purpose of taxation was in the county of the taxpayer's residence; the court holding that there was a legislative declaration to that effect. As appellant corporation has a legal residence, and not being in the class of corporations which are required to report to the auditor, it must be assessed in the same manner as that of a natural person. It seems to us that there is no escape from this conclusion. The Legislature has the unquestioned authority to fix the situs of property for the purpose of taxation. This conclusion is not in conflict with case of Lou. v. Tatum, Embry & Co., 111 Ky., 747, 23 R., 1014, 64 S. W., 836. In that case the effort was to tax partnership property, and the court held that a partnership is a distinct entity, and its property is subject to taxation at the place where it conducts its business. In that case some of the members of the firm lived in and some outside of the municipality which sought to impose the tax. The case of Wren v. Boske is made to turn

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upon the legislative intent, and this case is likewise made to turn.

The judgment is reversed for proceedings consistent with this opinion.

CASE 61—ACTION BY A. C. MAYES, &C., AGAINST J. E. LANE AND OTHERS ON A CONTRACT FOR BUILDING A CHURCH.—OCT. 28.

Mayes, &c. v. Lane, &c.

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APPEAL FROM M'CRACKEN CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFFS APPEAL. REVERSED.

BUILDING CONTRACT—CONSTRUCTION—BONDS—SURETIES' LIABILITY—COMPLETION OF CONTRACT—DISCHARGE—PAYMENT OF PRICE—BILL OF EXCEPTIONS—SIGNING—TIME—EXTENSION.

Held: 1. Where sureties of a building contractor bound themselves that the contractor would furnish the material and erect the building "in strict accordance with the plans and specifications furnished," and "in accordance with the terms and conditions of the contract," and the contractor failed to comply with the contract, the building was not completed, so as to release such sureties from liability.

2. Where sureties of a building contractor bound themselves that the contractor would furnish the material and erect the building, and the contractor furnished the material and labor, but the owner was compelled to pay for a portion thereof, the bond was not complied with.

3. Where a building contract provided that 85 per cent. of the contract price should be paid during the progress of the work, and the balance on final completion, the owner of the building was not bound to see that such 85 per cent. was applied by the contractor to the discharge of his obligations for material and labor, as against the contractor's sureties.

4. Where sureties of a building contractor agreed that the contractor would complete the building in strict conformity with the plans, etc., and would furnish all necessary material and la-

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bor, they were liable to indemnify the owner against claims for labor and materials furnished for the building for which the claimants were entitled to a lien thereon.

5. Where a building contract required the owner to pay 85 per cent. of the price as the work progressed, and the remaining 15 per cent. on final completion, the sureties on the contractor's bond were not released by reason of the owner's payment of the 15 per cent., before completion of the contract, in settlement of lien claims for material and labor, which operated to release the sureties' liability *pro tanto*.

6. Where an action was heard by the court, and it extended the time within which a bill of exceptions might be filed until the next term of court, the fact that thereafter the court held a special term did not affect the orders previously made, extending the time for filing the bill.

WM. MARBLE, HENDRICK & MILLER AND JOHN C. GATES, FOR APPELLANTS.

Appellants contend:

1. That in an action at law wherein the answer presents a purely legal defense, and where, upon the calling of the case for trial a jury is waived and the case submitted to the court for hearing upon the law and facts, the appellant had a right to require the court to separate his conclusions of fact and of law, and it is error in the court after this request has been duly made, to transfer the case to equity upon the court's own motion over appellants' objection and then render a judgment without such separate conclusions or findings. Civil Code, sec. 332. We can not find any decisions on this point because we suppose there is not a parallel case on record in Kentucky.

2. We contend that before a surety can claim that he is released by act of the creditor of his principal, he must show the act of the creditor either expressly released the principal or the surety, or was such as to *injure* the *rights* of the *surety* in some way or *suspend* or *lessen* his opportunity to *protect* himself or to be *substituted to the rights of the creditor*. Sneed's Exrs. v. White, 3 J. J. Mar., 529.

3. We contend in this case that the bond given by Lane with Hart and Katterjohn as his sureties, made the sureties liable for his failure to perform the work in a workmanlike manner according to the plans and specifications which accompanied and were made a part of the contract and also bound them to make good his failure to comply with that part of his contract which stipulated that he should "provide all the materials and perform all

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the work mentioned in the specifications and shown on the drawings prepared by the architect, and all other *labor* and *materials* necessary to complete the entire work" of a church building he contracted to erect—the sureties having, by their bond promised that he would do these very things. We say that under this bond the sureties were liable for mechanics' liens upon the building contracted by Lane in the erection thereof.

4. As the pleadings made an issue upon the question of defective work and an issue as to whether or not appellants violated their contract and acted negligently and in bad faith with the appellees, the sureties, and injured and lessened their chances to protect themselves by paying to Lane more than 85 per cent. of the contract price, we contend we had the right to have the court's conclusions of fact upon these points, separate from his conclusions of law.

AUTHORITIES CITED.

Civil Code, secs. 332, 334; Sneed's Exr. v. White, 3 J. J. Mar., 529; St. Mary's College v. Meagher, 11 R., 113; Royster v. Heck, 14 R., 266; Aaron v. Mendel, 78 Ky., 427.

J. D. MOCQUOT, ATTORNEY FOR APPELLEE HART.

1. The utmost good faith must be exercised by the principal toward a surety.

2. The release by a principal creditor of a fund upon which he could rely for his security, operates to release the surety in toto.

Under the provisions of the contract which, with the plans and specifications were drawn by a competent architect, the appellants were at all times required to retain in their hands 15 per cent. of the cost of labor and material incorporated into the building, and payments were only made on the authorization of the architect on certificates in writing given by him. At the conclusion of the work appellants should have had in hand $642, whereas the petition itself shows that they only had $163.17.

We claim there was an absence of good faith on the part of the principal creditor in this case, and also that the violation of the plain provisions of the contract released the sureties on Lane's bond in toto, and that the judgment of the chancellor was correct.

AUTHORITIES CITED.

Aaron v. Mendel, 78 Ky., 427; Sneed's Exrs. v. White, 3 J. J. Mar., 525; Royster v. Heck, 14 R., 266; St. Mary's College v.

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Meagher, 11 R., 112; Beach on Contracts, sec. 484; Gallegher v. St. Patrick's Church, 63 N. W. Rep., 864.

BLOOMFIELD & CRICE, ATTORNEYS FOR KATTERJOHN.

Four thousand three hundred dollars was the price to be paid to Lane for the building. No one intimates that Lane would lose anything, or did lose anything, at this price, and this whole sum was in the hands of appellants. They had the power therefore, by following the contract and paying only 85 per cent. as the work progressed to have saved the sureties and themselves and completed the building without trouble to themselves or the sureties, and reasonable good faith to the sureties, Katterjohn and Hart, who were absent, would have required, and surely did require this to have been done. Appellants were on the ground seeing the work as it progressed, and the amount of it, and with their architect to certify, and carrying out the contract with the sureties would have saved the sureties. And we insist this action is only an effort of appellants to unjustly charge back to these sureties money in their hands that the principal had no right to, and the payment of which to the principal was in bad faith to the sureties and entirely and absolutely released them as such sureties.

OPINION OF THE COURT BY JUDGE PAYNTER—REVERSING.

The Christian church at Princeton burned, and the congregation, desiring to rebuild it, entered into a contract with the appellee, James E. Lane, a contractor, for that purpose. The contract price was $4,300, but it was reduced to $4,280. Article 4 of the contract reads as follows:

"In consideration of the fulfillment of the agreement herein made by the contractor, the owner agrees to pay the said contractor the sum of forty-three hundred dollars ($4,300.00) in installments as follows: 85 per cent. of the cost of the labor and materials incorporated into the construction of the building from time to time as the work progresses and the balance ten days after the entire work has been completed, provided the property is free from all liens or rights of liens for debts due or claimed to be due from the contractor

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and satisfactory evidence thereof is furnished (if requested) to the owners.

"All payments shall be made upon written certificates from the architect to the effect that in their opinion such payments have become due, but no certificates or payments shall be considered as a waiver by the owner of any of the provisions of this contract, nor shall any waiver of any breach of this contract be held as a waiver of any other or subsequent breach."

Those representing the church, being unwilling to rely upon Lane's obligation, required him to give a bond to secure the church, which he did, with George O. Hart and F. W. Katterjohn as sureties. The bond reads as follows:

"This Agreement Witnesseth:—That whereas James E. Lane, of the city of Paducah, Ky., has entered into a contract in writing of even date herewith, with E. M. Johnson, T. M. Powell and T. J. Johnson as the building committee, selected by the members of the Christian church of Princeton, Ky., through their board of officers, to supervise and direct and contract for the construction of a church building in Princeton, Ky., to furnish the material, build and erect for them a brick church building on the lot of ground on which the Christian church, which was recently destroyed by fire, stood, for the sum of four thousand and three hundred dollars ($4,300.00) well and truly to be paid to said Lane, and said Lane to furnish said material and build and erect said church building in strict accordance with the plans and specifications furnished.

"Now, therefore, in consideration of the premises, and in order to secure said E. M. Johnson, T. M. Powell and T. J. Johnson, building committee, as aforesaid, in the faithful compliance by said Lane with the terms of said contract, said Lane and the undersigned F. W. Katterjohn, Jr., and George

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O. Hart, his sureties, hereby declare and acknowledge themselves firmly bound and indebted to said E. M. Johnson, T. M. Powell and T. J. Johnson, building committee as aforesaid, in the sum of two thousand five hundred dollars ($2,500.00); this obligation to be void however if said Lane shall well and truly furnish said material and build and erect said church building in strict accordance with the terms and conditions of said contract, otherwise it shall remain and be in full force and effect."

Pursuant to the contract, Lane began the construction of the church. According to the claim of the representatives of the church, and which is sustained by the evidence, Lane did not construct and complete the church according to the plans and specifications and terms of his contract. It will be observed that 85 per cent. of the contract price was to be paid upon the certificate of the architect as the work progressed, and 15 per cent. was to be paid in ten days after the building was completed, providing the property was free from all liens or rights of liens for debts due or claimed to be due from the contractor. The 85 per cent. was paid before the building was completed. After the contractor had quit the work, but before the building was completed, as required by the contract, the 15 per cent. was paid (less something over $100) to persons having liens on the building for material and labor. After Lane quit work upon the building, it was ascertained there were several hundred dollars due from the contractor for material which had been used in the construction of the building, and due laborers for work done in the construction of it. These sums the church was compelled to discharge. This action was brought against the sureties on his bond to recover damages for his failure to complete the building according to his contract, and for failing to discharge the debts for the material and labor, and for which

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liens existed on the building. Defense is made chiefly upon the grounds (1) that the church was completed; (2) that the bond of the sureties did not make them liable for the defective construction of the building, or to discharge any liens existing for material or labor in its construction; (3) that, as the church did not retain the 15 per cent. of the contract price, the sureties are released from liability on the contract.

We must first determine what liability was imposed upon the sureties by their bond. Under the contract the sureties bound themselves that Lane would furnish the material and build the church "in strict accordance with the plans and specifications furnished," and "in accordance with the terms and conditions of said contract." Was the building completed, in the contemplation of the agreement of the parties, if it was not built in accordance with the specifications and terms of the contract? Our opinion is that it was not. The building committee representing the church desired the building to be erected according to plans and specifications agreed upon. This the contractor agreed to do, and the sureties guarantied that it would be so built. The rule is that the sureties are only bound according to the terms of their bond. Certainly it would be an utter disregard of the language of the bond to hold that the church was completed, when Lane failed to erect it according to the plans and specifications. The sureties guarantied that Lane would furnish the material and erect the building. In the erection of the building, Lane had to perform the labor himself, or to employ some one to do it. It follows that the sureties guarantied that the necessary materials and labor would be furnished to erect the building. But it is urged on behalf of the sureties that the terms of their bond were complied with when the material and labor were furnished; that their contract did not require them to protect the church against the cost of the ma-

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terial and labor. Reduced to the last analysis, their claim is that Lane complied with his contract by furnishing the material and labor, although the church was compelled to pay for such part for which Lane failed to pay. Lane did not comply with his contract when he furnished the material and labor, unless he paid for it, or released the building from liability therefor. The parties agreed that Lane was to draw 85 per cent. of the contract price for the purpose of paying his accounts for material and labor, and it may be added here that the church was under no obligation to see to the application of the 85 per cent. to the discharge of such debts. Under the law, a lien existed for the material which went into the building, and for labor performed in its erection. It would be an extremely narrow view to take of the contract to hold that the sureties were under no obligation to protect the church against the claims for material and labor for which a lien existed on it.

The next contention is that they are released because the church paid out most of the 15 per cent. of the contract price before the church was completed according to the contract. We recognize the law to be that the relation between a creditor and one known to him as surety is one of trust and confidence, and demands the exercise of good faith upon the part of the creditor in dealing with him. Circumstances under which a surety may be released by the conduct of the creditor are well stated in Sneed's Ex'r v. White, 3 J. J. Marsh., 526, 20 Am. Dec., 175, where the court said: "But any settled agreement or active interference by the obligee whereby the surety may be injured or subjected to increased risk, or deprived of or suspended in the assertion of his equitable right to force the obligee to sue the principal, or of his right to pay the debt, and occupy the attitude, in equity, of the obligee, will release the surety in equity." It is perfectly

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manifest that the 15 per cent. was to be withheld until the church was completed, and to be applied to the discharge of any liens which might be ascertained to exist against the church. The evidence in this case shows that the 15 per cent. was not sufficient to discharge the lien claims against the church, by several hundred dollars, but whatever part of it was so applied was disposed of as the contract required. The sureties can not complain of that disposition of it, as it was made according to the terms of the contract. Besides, that disposition of it released them, *pro tanto,* of their liability for the debts paid with it. Our conclusion is that the sureties guarantied that Lane would furnish the material and labor necessary to complete the contract, and after he failed to do it they are liable to the church for the damage which was sustained by the breach of the contract, not to exceed the amount of their bond; that their obligation is not discharged until the building has been released of liens for material furnished and labor performed in the erection of the building.

Our opinion is, under the facts of this case, the appellants are not entitled to recover the $10 per day for the delay in the completion of the building. It was an action at law, and the law and facts were submitted to the court, and the testimony was heard in open court, but the court transferred the case to equity on his own motion while it was so being heard. The court extended the time until a day in the next term of court for filing a bill of exceptions. Afterwards the court called and held a special term. At the special term the appellants presented the bill of exceptions, but the appellee objected to having it signed and made part of the record, presumably because it was proper to have it done on the day in the next regular term fixed in the order of extension. The bill of exceptions was presented and signed and made part of the record at the time designated by the order

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of the court. Our opinion is that the intervening of the special term did not affect the order previously made extending the time for filing the bill of exceptions.

The judgment is reversed for proceedings consistent with this opinion.

Petition for rehearing by appellee overruled.

CASE 62—ACTION BY E. P. JAMES AGAINST BUTLER COUNTY FOR SALARY AS COUNTY JUDGE.—OCT. 28.

Butler County v. James.

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APPEAL FROM BUTLER CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

OFFICE AND OFFICERS—SALARIES—CHANGE DURING TERM—FISCAL COURT—POWERS—ORDERS—VALIDITY—DEFENSES—PART PAYMENT—ACCEPTANCE—ESTOPPEL.

Held: 1. Where the fiscal court failed to fix the salary of the county judge for his entire term before his election or qualification, as it is required to do by Constitution, sections 161, 235, it may fix such salary thereafter.

2. Constitution, section 161, provides that the compensation of county officers shall not be changed after their election or during their term, and section 235 provides that the salaries of public officers shall not be so changed. HELD, That where the fiscal court appropriated a sum of $500 for the salary of a county judge for the first year of his term, it had no power by a subsequent order to allow him a different amount.

3. Where the fiscal court of a county attempted to change the salary of a county judge during his term, which it was prohibited from doing by Constitution, sections 161, 235, its orders in that behalf were void, and no defense to an action by the judge to recover his full salary.

4. Where the salary of a county judge was illegally reduced during his term, his acceptance of the amount allowed did not estop him from claiming the remainder.

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J. W. HARRELD, ATTORNEY FOR APPELLANT.

1. The question raised by special demurrer is that of jurisdiction. Appellant county contends that the fiscal court of the county was a court of competent jurisdiction that this matter was brought before that court, adjudicated, and that appellees' remedy was by appeal to the circuit court from that judgment.

2. We hold that said judgment and orders were not void.

3. The constitutional convention did not intend that sections 161 and 235 thereof should apply to the office of county judge.

4. But if these sections do apply to such officer, then we contend that appellee was re-elected in 1897; that while in office in 1897 the fiscal court in October, 1897, adjourned without fixing his salary, and after his re-election in November, 1897, the court reconvened November 9, 1897, and raised his salary for 1898 from $400 to $500. Section 161 of the Constitution says the salary shall not be changed after appointment or election nor during his term of office.

CITATIONS.

Newton v. Ohio county, 79 Ky., 267; Constitution, secs. 161 and 235; Constitutional Debates, vol. 4, p. 5581.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

Appellee, James, was elected county judge of Butler county at the November election, 1893, and at the November election, 1897, was re-elected to that office. He served out his term. He was allowed by the fiscal court, for his services as county judge, $400 for the year 1897, $500 for the year 1898, $400 for the year 1899, $400 for the year $1900, and $500 for the year 1901. He accepted his pay as allowed by the fiscal court, but after the conclusion of his term filed this suit to recover of the county $200, on the ground that his salary had been fixed at $500 a year, and that for two years of his term only $400 had been paid to him. The county demurred to his petition. The demurrer was overruled. It then filed an answer pleading the orders of the fiscal court in bar of the action. A demurrer was sustained to the

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answer, and, judgment having been entered in favor of the plaintiff, the county appeals. The orders of the fiscal court referred to are as follows:

"Butler Fiscal Court, October term, 23d day of October, 1896. Appropriated out of the county levy for 1897, for county judge's salary for the year 1897, same to be paid quarterly as prescribed by law. $400.00."

"Butler Fiscal Court, October term, 9th day of November, 1897. Appropriated out of the county levy 1898, $500.00 for county judge's salary for year 1898, to be paid quarterly as prescribed by law."

"Butler Fiscal Court, 5th day of October term, 7th day of October, 1898. Appropriated out of county levy of 1899, $400.00 for county judge's salary for year 1899, to be paid quarterly as provided by law."

"Butler Fiscal Court, 5th day of October term, 6th day of October, 1899. Ordered that there be appropriated out of the county levy of 1900, for the purpose of paying county judge's salary for the year 1900, the sum of $400.00, same to be paid quarterly as prescribed by law. Upon question of which allowance esquires present each voted 'yea,' except Esq. Taylor, who did not cast his vote upon the question."

Before the adoption of the present Constitution, it was customary for the court of claims to make allowances annually to the county judge and county attorney, and it is apparent from the above orders that the Fiscal Court of Butler County has been proceeding in the same way since the adoption of the present Constitution, not observing its provisions:

"The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office; nor shall the term of any such

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officer be extended beyond the period for which he may have been elected or appointed." Section 161.

"The salaries of public officers shall not be changed during the term for which they were elected; but it shall be the duty of the General Assembly to regulate, by a general law, in what cases and what deductions shall be made for neglect of official duties. This section shall apply to members of the General Assembly also." Section 235.

Under these provisions, it has been held that the fiscal court can not make any change in the salary of the county judge during his term of office, and that, while it is the duty of the fiscal court to fix the salary of the county judge for his entire term before his election or qualification, yet, if it shall fail to do so, it may fix his salary thereafter. Marion County Fiscal Court v. Kelley, 22 R., 174, 56 S. W., 815; Barrett v. Falmouth, 109 Ky., 151, 22 R., 667, 58 S. W., 520.

The purpose of the constitutional provisions is to leave the officials, whose duty it is to fix the salary, free from the importunity and personal influence of the incumbent of the office, and to secure to him for his term, when his salary is once fixed, the amount so agreed to be paid him, and thus make him more independent in the discharge of his official duty. Under these provisions of the Constitution it is the duty of the fiscal court to fix the salary of the county judge and other county officers, to be allowed by it, before their election; that is, there should be a general order fixing the salaries, and not an allowance each year for that year; and when the salaries are once fixed, they can not be changed to affect those already elected or appointed, and any change will not take effect until after the next election or appointment.

The Butler Fiscal Court, before the election of appellee,

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should have made a general order fixing the salary of the county judge; but if they had failed to do this they could fix it after his election, or else it could not be fixed at all, and the failure of the fiscal court to do its duty can not be permitted to deprive the county judge of his reasonable compensation guarantied him by law; but, when his salary was once fixed, it could not be changed during his term, so that he would receive a different amount for different years of his term. The order of the county court made at its October term, 1896, did not undertake to fix the salary of the county judge, or make any provision for it, except for the year 1897. It is substantially the same as the order in the case of the Marion County Fiscal Court v. Kelley, which was held only to apply to the year 1897. But the order made by the fiscal court on November 9, 1897, appropriated $500 for the county judge's salary for the year 1898, and he was under this order entitled to have a salary of $500 for the first year of his new term. If the court could by a subsequent order allow him a different amount, then his salary would be changed during his term, contrary to the express provision of the Constitution. The difficulty with the orders made for the years 1899 and 1900 is that they change the salary of the county judge during his term of office.

The orders of the fiscal court are not a bar to the action. It is a body of limited power. One of the things which it has no power to do under the Constitution is to change the salary of county officials during their terms. Its attempt to change the salary of the county judge, being in violation of the Constitution, was void, and, being void, their order may be disregarded when pleaded in bar. Morgantown Deposit Bank v. Johnson, 108 Ky., 507, 22 R., 210, 56 S. W., 825.

The county judge waived none of his rights by accepting

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the $400 allowed him for the two years in controversy. He was entitled to a term of four years under the Constitution. He was also entitled to the salary of $500 a year, which, under the Constitution, could not be changed during his term. The acceptance of a part of a debt never estops one to claim the remainder. The case of Lexington v. Rennick, 105 Ky., 779, 20 R., 1609, 49 S. W., 787, 50 S. W., 1106, rests on essentially different facts. There the city had the power of removal, and the officers, by accepting the sums paid them, led the city to understand that they were willing to serve it therefor, and thus secured a continuance of their holding which was dependent upon the pleasure of the city.

Judgment affirmed.

CASE 63—ACTION BY THE AMERICAN STEEL HOOP COMPANY AGAINST HARRY GUENTHER TO RECOVER FOR A CARLOAD OF IRON SOLD AND SHIPPED TO DEFENDANT.—OCT. 28.

116 580
e125 370

76 SW 419

Guenther v. American Steel Hoop Co.

APPEAL FROM DAVIESS CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

PROCESS — NONRESIDENT — SUBSTITUTED SERVICE—CONSTITUTIONALITY OF STATUTE—SUIT FOR PRICE OF GOODS—DENIALS—BREACH OF CONTRACT—ASSUMPTION BY PLAINTIFF—SUBSEQUENT INCORPORATION.

Held: 1. Civil Code, sec. 51, subdivision 6, providing that "in actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State," substituted service may be had, authorizes substituted service on a nonfesident individual.

2. As nonresidents are presumed to be without the State, it is not

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necessary to show, in order to sustain substituted service on a nonresident as authorized by Civil Code, section 51, subdivision 6, that he was at that time outside the State.

3. Civil Code, section 51, subdivision 6, providing that, in the case of nonresidents doing business within the State, substituted service may be made upon their managers, agents, or persons in charge of such business, is not invalid as providing for insufficient notice.
4. Civil Code, section 51, subdivision 6, authorizing substituted service on nonresidents, does not violate Constitution of the United States, article 4, section 2, providing that citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.
5. A denial in an answer that defendant is a nonresident on whom substituted service is authorized by Civil Code, section 51, subdivision 6, is immaterial, as answering waives the question of sufficiency of service.
6. In a suit for the price of goods, a denial that defendant is indebted in any sum is a conclusion of law.
7. In a suit for the price of goods, a denial that defendant agreed or promised to pay the money sued for constitutes no defense, where allegations in the petition that the goods were sold and delivered at defendant's special instance and request, and at prices set out in an itemized account filed therewith, are not controverted.
8. In a suit for the price of goods, defendant alleged in his counterclaim for failure to deliver in time that, though the incorporation of plaintiff had been effected subsequently to the breach by his original vendor, yet it had been previously agreed upon by the original vendor and others; that such vendor had closed its plant for the purpose of taking stock, with a view to the consolidation, and that plaintiff had been incorporated for the purpose of taking the contracts, assets, business, good will, and liabilities of the consolidating firms, and did take, pursuant to the agreement, all the contracts of the original vendor, including defendant's, and undertook to carry the same out; that plaintiff took possession and control of the original vendor's plant, and agreed to carry out the contract with defendant; and that plaintiff's incorporation was, in part, to enable it to do so. HELD, Demurrable, as not alleging enough to show that plaintiff had assumed a contractual obligation to defendant, which had ripened into a liability before plaintiff came into existence.

SWEENEY, ELLIS & SWEENEY, ATTORNEYS FOR APPELLANT.

1. Our first contention is that the service of the process in this case on John R. Wright as the manager for the defendant Guenther, and in charge of defendant's business in Owensboro,

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was no service at all and did not bring said defendant before the court.

The return on the process is in the following words: "Executed on the within-named defendant, Harry Guenther, by delivering to John R. Wright, manager for said defendant Guenther, and in charge of defendant's business in Owensboro, a true copy of the within summons, November 22, 1900. J. W. Jones, S. D. C., by Jim Jones, D. S."

Although the defendant may have been a non-resident of the State, yet service upon his agent could in no event have been authorized except it was alleged that he was at the time of such service *absent from the State.*

2. The court having with much hesitation held the service good, the defendant then filed answer and amended answer alleging a state of facts that the defendant not only had the right to recover damages naturally flowing out of the breach of contract alleged between himself and the plaintiff and J. Rainer Sons' Company, but by which he may recover special damages in the profits which he would have made on the contract between himself and Taylor & Blackford, and also a sum equal to the damages which Taylor & Blackford recovered against the defendant on account of the breach of the contract between them, which breach was the direct result of the breach between the plaintiff and defendant, but the lower court for reasons we can not understand sustained a demurrer to them, or, what was equivalent, pronounced a judgment on the face of the pleading, thereby holding the answers presented no defense whatever.

We insist that the judgment of the lower court is wrong; that the answers, both the original and amended one, present a perfectly good defense, which, if sustained by proof, would, if not altogether, to the extent of the damages shown, defeat the plaintiff's cause of action.

POWERS & ANDERSON, ATTORNEYS FOR APPELLEE.

POINTS AND AUTHORITIES.

1. Summons may be served on the agent of a nonresident of this State, who is engaged in business in this State, in the county where the business is carried on. Subsec. 6 of sec. 51, Ky. Civ. Code; Fox. v. Bluegrass Grocery Co., 60 S. W. R., pp. 414, 927.

2. Although appellant was not a nonresident of the State of Kentucky when he filed his answer, this entered his appearance, though he filed his answer under protest. Tipton v. Wright, 7 Bush, 449; Lillard v. Brannin & Brand, 91 Ky., 516.

3. An answer denying that the goods were sold and delivered

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is not sufficient, but the answer must respond as to each and every item in the account. Newman on Pleading, p. 501; Webb v. Jeffries, 2 Bush, 222; Whittaker v. Sandifer, 1 Duv., 262.

4. Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of it. Hadley v. Baxendale, Sedgwick on Damages, vol 1, 8th ed., p. 203; Sedgwick on Damages, vol. 1, 8th ed., pp. 220, 223; Bluegrass Cordage Co. v. Luthy & Co., 98 Ky., 583.

5. Obvious and absolute physical impossibility apparent upon the face of the promise and thus known to the parties renders the promise void. Beach on the Modern Law of Contracts, vol. 1, sec. 222; Leak on Contracts, p. 686. In this connection, also see Statute of Frauds, subsec. 4; sec. 470, Ky. Stats.; Chesapeake, Ohio & Southwestern R. R. Co. v. Griest, 85 Ky., 619.

6. If the pleader does not allege that the promise was in writing it will be presumed that it was in parol. 4 Met., 371; 14 Bush, 776; 15 B. M., 443; 3 Met., 463.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

Appellee, the American Steel Hoop Company, filed this action against Harry Guenther, doing business in the firm name of Harry Guenther & Bro., to recover $647.43 for a carload of round bar iron sold and delivered by the plaintiff. It was alleged in the petition that the defendant is a non-resident of the State, and that John S. Wright is the agent and manager of his business in the State of Kentucky. A summons was issued on the petition, which was returned by the sheriff as follows: "Executed on the within-named defendant, Harry Guenther, by delivering to John S. Wright, manager for said defendant, Harry Guenther, and in charge of said defendant's business in Owensboro, Ky., a true copy of the within summons." Thereafter this order was entered:

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"Defendant moves that the court quash the return of summons, to which plaintiff objects. Having considered said motion, the same is overruled, to which defendant excepts." The propriety of this order is the first question to be determined on the appeal. Subsection 6 of section 51 of the Civil Code is in these words: "In actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred." It is insisted that the statute was intended to apply to non-resident firms, associations, or joint stock companies engaged in business in this State, when all of the members reside in another State, and no more. But the first words of the section are, "In actions against an individual residing in another State." Where the business is done in this State by persons not residing here, but engaging in business here, the mischief intended to be remedied by the statute does not depend upon the number of persons running the business. The purpose of the statute is to afford some means of serving process upon this class of persons who engage in business in this State, carrying it on through agents having charge of the business, and not directing it in person. Both the language of the statute and its evident purpose cover this case, as the defendant carries on a manufacturer's business in Owensboro.

It is also objected that it was not shown that the defendant was absent from the State when the process was served on his agent, and, as it has been the policy of the State to require personal service, this must be shown. But the statute does not so provide. It is not presumed that a non-resident of

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the State is in the State. If the defendant desired to raise this question, he should have shown the fact. This he did not do.

It is also insisted that the statute is invalid, and in support of this position we are referred to Moredock v. Kirby (C. C.) 118 Fed., 180; Pennoyer v. Neff, 95 U. S., 714, 24 L. Ed., 565; and Grover, etc., Co. v. Radcliffe, 137 U. S., 287, 11 Sup. Ct., 92, 34 L. Ed., 670. In Carpenter v. Laswell, 23 R., 686, 63 S. W., 609, and Nelson Morris & Co. v. Rehkopf & Sons, 25 R., 352, 75 S. W., 203, it was stated by this court that the statute referred to is valid, but it is urged that the question was not before the court in either of those cases; and, as the subject is important and not without difficulty, we will consider the question as a new one. In Pennoyer v. Neff an action was brought in the United States Circuit Court for the District of Oregon to recover a tract of land. The defendant claimed title to the land under a sheriff's sale made under a personal judgment in the State court against the plaintiff, who was a non-resident of the State of Oregon, upon constructive service by virtue of a statute of the State. The Supreme Court held the title bad, but, in concluding its opinion, after stating, to prevent misapplication of its reasoning, that certain things were not meant, the court added this: "Neither do we mean to assert that a State may not require a non-resident entering into partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice of legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure to make such appointment or to designate such place, that service may be made upon a public officer designated

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for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. As was said by the Court of Exchequer in Vallee v. Dumergue, 4 Exch., 290: 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.'" In Grover, etc., Co. v. Radcliffe, 137 U. S., 287, 11 Sup. Ct., 92, 34 L. Ed., 670, a judgment had been entered in Pennsylvania, without process of any kind, on a bond for the payment of money, which stipulated that, if the bond was not paid, judgment by confession might be entered in any court, without notice, and there was a Pennsylvania statute authorizing the proceedings. Suit was brought in Maryland to enforce the judgment. The Supreme Court of Maryland declined to enforce it against a citizen of that State, and the Supreme Court of the United States affirmed its judgment. After showing that the judgment was not valid under the laws of Maryland, the Supreme Court said: "And the distinction between the validity of a judgment rendered in one State, under its local laws upon the subject, and its validity in another State, is recognized by the highest tribunals of each of these States." Further on, in answer to the objection that the defendant must be presumed to have contracted in view of the laws of Pennsylvania, the court said: "But we do not think that the citizen of another State than Pennsylvania can be thus presumptively held to knowledge and acceptance of statutes of the latter State. What Benge authorized was a confession of judgment by any attorney of any court of record in the State of New York or any other State, and he had a right to insist upon the letter of the

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authority conferred. By its terms, he did not consent to be bound by the local law of every State in the Union relating to the rendition of judgment against their own citizens without service or appearance, but on the contrary made such an appearance a condition of judgment. And even if judgment could have been entered against him, not being served and not appearing, in each of the States of the Union, in accordance with the laws therein existing upon the subject, he could not be held liable upon such judgment in any other State than that in which it was so rendered, contrary to the laws and policy of such State. The courts of Maryland were not bound to hold this judgment as obligatory either on the ground of comity or of duty, thereby permitting the law of another State to override their own." Neither of these cases seem to have any application to the question presented. The judgment complained of was not rendered on constructive service of process, nor is the question now raised as to what effect should be given the judgment beyond the confines of this State, where the statute authorizing the mode of service which was followed is without force. As the defendant was running his foundry in this State when the process was served, and as the process was served on his manager in charge of the business, and the iron was bought for the business, the case seems to fall within the qualification made by the court of the rule laid down in Pennoyer v. Neff.

There is a vital distinction between constructive service of process, under section 57 of the Civil Code, and substituted service of process, under sections 51-54. By subsection 4 of section 51, the process may be served upon a common carrier in any county by delivering a copy to its chief officer or agent; and this section was upheld, although the defendant was not incorporated. Adams Express Co. v. Crenshaw, 78

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Ky., 136. By subsection 3 a similar mode of serving process is allowed where the defendant operates a railroad, and by subsection 5 service of process against the owner is authorized to be had by delivering a copy to the agent of the person operating the railroad, where a lease has been made. This provision was held valid in Maysville, etc., R. R. Co. v. Ball, 108 Ky., 241, 21 R., 1693, 56 S. W., 188. By section 52, if the defendant is under fourteen years of age, the summons must be served on his father, or, if he have no father, on his guardian, or, if he have no guardian, on his mother, or if he have no mother, on the person having charge of him. By section 53, similar provision is made for the service of process on persons of unsound mind. By section 54, if the defendant is a prisoner in the penitentiary a copy of the petition must accompany the summons, and the service must be on the keeper of the penitentiary, who shall deliver the copy of the petition and summons to the prisoner. By section 55, if the defendant be a community of Shakers, holding property in common, the service must be made by posting a copy of the summons at the door of its meeting house, and by delivering a copy to some member of the community. Similar provisions to these have been in force in this State from the earliest times, and in other States of the Union. In many of the States it is provided by statute that a copy may be left at the defendant's place of abode where it is impossible to obtain personal service. In New York, when substituted service is necessary, an order of the court is required, and the order can not be attacked collaterally. In the federal courts, without the aid of any statute, substituted service is allowed in an ancillary proceeding to bring in parties to the principal suit. See 19 Ency. of Pleading and Practice, pp. 620, 621. The general rule is that substituted service of process is equivalent to personal service, and war-

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rants a personal judgment, if made in the manner pointed out by the statute, on the ground that the defendant is presumed to have received the notice. Sturgis v. Fay, 16 Ind., 429, 79 Am. Dec., 440; Rauber v. Whitney, 125 Ind., 216, 25 N. E., 186; People v. House, 4 Utah, 382, 10 Pac., 843; Conwell v. Atwood, 2 Ind., 289; Burbage v. American National Bank, 95 Ga., 503, 20 S. E., 240. Where a non-resident obtained a common law judgment, and a suit was brought in equity to enjoin it, it was held that process might be served on his attorney without the aid of the statute. Chalmers v. Hack, 19 Me., 124. The same rule is followed in the federal courts in actions for a new trial. Oglesby v. Attrill (C. C.) 14 Fed., 214, 4 Woods, 114, and cases cited.

It is thus apparent that there have always been well-recognized exceptions to the general rule requiring personal service of the process on the defendant, and the competency of the Legislature to provide for a substituted service, when necessary, has been generally recognized by the courts. In Biesenthall v. Williams, 62 Ky., 331, 85 Am. Dec., 629, a suit was brought in this State to enforce a judgment rendered in Ohio on a service of process by leaving a copy at the defendant's residence, the defendant being then a citizen of Ohio. The court held the judgment valid, and enforced it, saying that this mode of service was, under the statute, an actual service of process, and that the laws of Ohio were binding upon the citizens of that State, although they could not operate extraterritorially. The non-resident of this State who comes into it and does business here does so subject to its laws, and when he carries on this business by a substitute the State may properly provide that the service of process on the substitute shall be legal. No sound distinction can be drawn between such a provision of the statute and that authorizing process against an infant under

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fourteen years of age or a lunatic to be served on the person having charge of him, or against the persons operating a railroad on the agent in the county where the transaction occurs. If notice of the action does not in fact reach the defendant, ample remedy is also provided by the Code for the granting of new trials, where, from unavoidable casualty or misfortune, the party is prevented from appearing or defending. Code, section 518; McCall v. Hitchcock, 9 Bush, 66. In the case before us the defendant in fact received notice of the action, for he appeared and moved to quash the process. In the case of Moredock v. Kirby (C. C.) 118 Fed., 180, process served under the statute in question was quashed by the Circuit Court of the United States for the District of Kentucky upon the authority of Pennoyer v. Neff, and because it deprived citizens of other States of the rights and privileges of citizens of this State. We can not see that section 2 of article 4 of the Constitution of the United States has any application. As shown, the statutes of the State allow substituted service of process on other classes of persons than non-residents of the State. The rights and privileges guarantied to the citizens of the States by the Federal Constitution are their fundamental rights as citizens. What rights the guaranty includes the Supreme Court has declined to define, but legal remedies may be allowed against those who are domiciled without the State which are not allowed against those who are domiciled within it. Thus, in Cooley on Constitutional Limitations (6th Ed.) 490, after pointing out certain rights that are included, it is said: "But it is unquestionable that many other rights and privileges may be made—as they usually are—to depend upon the actual residence; such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like. And the constitutional provisions are not violated by

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a statute which allows process by attachment against a debtor not a resident of the State, notwithstanding such process is not admissible against a resident." So it is held that a statute requiring security for cost from non-resident plaintiffs suing in the State is valid. Id., p. 25, note; 19 Ency. of Pleading and Practice, 344, and cases cited. Under these principles the Legislature of any State may classify litigants according to the impracticability of obtaining personal service of process, and authorize substituted service when necessary to the administration of justice. This right of the States seems to be expressly recognized by the Supreme Court in Pennoyer v. Neff. We therefore conclude that the statute is not invalid, and that the motion to quash the process was properly overruled.

The defendant, in his answer, put in issue the allegation of the petition that he was a non-resident of the State. This was immaterial, for, having gone into the merits of the case, as he did by his answer, he had entered his appearance to the action. In the first paragraph of the answer the defendant undertook to put in issue the allegations of the petition as to the purchase of the iron sued for; but the denials of this paragraph were insufficient, and the court properly sustained a demurrer thereto. The denial that the defendant was indebted in any sum was only a statement of a conclusion of law. The denial that the defendant agreed or promised to pay the plaintiff the money sued for was insufficient to constitute a defense, the allegations of the petition that the iron was sold and delivered at the defendant's special instance and request and at the prices set out in the itemized account filed being undenied. In the other paragraph of the answer the defendant alleged that on the —— day of March, 1899, he contracted with the firm of Taylor & Blackwell, at Lewisport, Ky., to manufacture for them 1,000 plow fenders, to be

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delivered not later than April 15, 1899, and in order to enable him to comply with his contract he wrote to J. Painter & Sons' Company on March 6, 1899, at Pittsburg, Pa., offering to purchase the necessary material for the fenders, notifying them within what time he must have it in order to comply with his contract; that they answered on March 8, 1899, and agreed to furnish him with the material within ten days or two weeks, and, relying on this, he closed his contract with Taylor & Blackwell; that about this time J. Painter & Sons' Company took stock in appellant, and appellant undertook to carry out the contract of J. Painter & Sons' Company, but failed to do so, and thereby he was disabled from carrying out his contract, and sustained damages in the sum of $1,000, which he plead as a counter-claim and set-off. The plaintiff, by its reply, put in issue the allegations of the answer, and then pleaded that it was incorporated on April 14, 1899, and had no existence before that date, and that the time within which the iron was to be furnished, under the allegations of the answer, had expired before it came into existence. A copy of the article of incorporation was filed with the reply, sustaining its allegation as to the time when the plaintiff was incorporated. To this reply the defendants filed the following rejoinder: "Defendants state that, while it may be true that plaintiff was incorporated on the 14th day of April, 1899, they charge and allege the fact to be true that the said J. Painter & Sons' Company had previous to that time, with others, gone into and had agreed upon the terms upon which they would form a corporation known as the American Steel Hoop Company, and that the foundry, mills and plant, factories of J. Painter & Sons' Company had shut down for the purpose of taking stock with a view to delivering the same to said company, the plaintiff herein; and that the said company, the American Steel

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Hoop Company, had been formed for the purpose, among other things, of taking the contracts, the assets and business, good will and liabilities of corporations, associations, and firms and individuals, and did take, pursuant to the agreement they had, all the contracts of J. Painter & Sons' Company, including the one pleaded by defendant in its answer, and undertook to carry the same out, knowing at the time and having in its possession and under its control all correspondence between defendant and J. Painter & Sons' Company. They further state that while the said J. Painter & Sons' Company agreed and contracted to furnish the material to defendant within ten days or two weeks after the 12th day of March, 1899, they state that after plaintiff had taken possession and control of the said J. Painter & Sons' Company, it undertook and agreed to carry out said contract, and its incorporation was in part to enable it to carry out the contracts of the said J. Painter & Sons' Company with other contracts it had agreed and assumed to do at the time of the formation of the corporation, and in pursuance of a plan that had been promulgated prior thereto." The court sustained a demurrer to the rejoinder, and entered judgment for the plaintiff. The defendant failed to plead further. By the terms of the defendant's contract he was to deliver the fenders on April 15th. The plaintiff did not come into existence at Pittsburg until April 14th. The material ordered of J. Painter & Sons' Company was a lot of steel, costing something over $50, which was ordered to be shipped from Pittsburg to Owensboro by water. It was manifestly too late for appellee to comply with the contract of J. Painter & Sons' Company. That company became liable, under the pleading, when it failed to deliver the goods within two weeks of March 12th. The liability of J. Painter & Sons' Company for the

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contract which it had broken became absolute before appellee was incorporated. The rejoinder is not sufficient in its averments to show that appellee assumed all the liabilities of J. Painter & Sons' Company, or that it assumed its liability to appellant. Its undertaking to carry out contracts which were subsisting was a very different thing from its undertaking to assume the liabilities of J. Painter & Sons' Company for past transactions. There is not enough in the rejoinder to show that appellee is answerable to appellant for the shortcoming of J. Painter & Sons' Company, which had ripened into an absolute liability before appellee came into existence.

Judgment affirmed.

Chief Justice Burnam dissenting on the question of the validity of the service of process.

CASE 64—CLAIM BY HENRY ENGLE FOR WORK DONE BY HIM ON A PUBLIC HIGHWAY IN PERRY COUNTY.—OCT. 29.

Perry County v. Engle.

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APPEAL FROM PERRY CIRCUIT COURT.

CLAIM ALLOWED BY CIRCUIT COURT AND PERRY COUNTY APPEALS. REVERSED.

HIGHWAYS—REPAIRS—CONTRACTS—AUTHORITY OF COUNTY COURT—NOTICE OF THE LAW.

Held: 1. A county court has no authority to let contracts concerning the repairs of public roads.

2. Under Kentucky Statutes, 1899, section 4339, governing the cutting down of hills on public roads by contract, providing that the road supervisor, on order of the county judge, may let the work to the lowest and best bidder, and concluding, "If there be no su-

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pervisor, the fiscal court may order such work done in the manner provided in this section by the county judge or a commissioner appointed by it," where the fiscal court had not appointed a supervisor of roads, the action of the county court in appointing a commissioner, and the action of the commissioner in letting such work to a contractor, were void, and the county was not liable therefor.

3. All persons must take notice that a county can contract only in the manner and by the persons and for the purposes expressly provided by statute.

F. J. EVERSOLE, COUNTY ATTORNEY, AND CLEON K. CALVERT, ATTORNEYS FOR APPELLANT.

At the October term, 1901, of the Perry County Court John Smith was, by an order of said court, appointed a special commissioner for said county to let a contract to blow out rock in Troublesome creek, opposite Mill Branch, under which authority Smith, as commissioner, made a contract with Henry Engle to do said work, and at the following February term filed his report to said court with a bond taken by him from Engle for the performance thereof. On the same day appellant filed its exceptions to said report and to the order appointing said Smith special commissioner, which were sustained by the court, and the court adjudged said order void and all proceedings thereunder were held for naught.

At the April term of the fiscal court of Perry county appellee filed a claim of $400 for said work which was heard and disallowed, and from this order an appeal was prosecuted to the Perry Circuit Court, which rendered a judgment in favor of appellee for $400, from which judgment this appeal is prosecuted.

We contend that the appeal from the judgment or order rejecting the claim in the fiscal court is not well taken:

1. Because the alleged claim arose upon a contract which was illegal and void.

2. Because an appeal from an order of a fiscal court only lies when the question to be decided is based upon the reasonableness of a claim and not when a question of debt is to be litigated, the remedy being for the claimant to file a petition and plead his contract and its performance in the usual way.

3. We contend that the order appointing Smith special commissioner for Perry county was *ultra vires* and void, and all his acts thereunder were void and that he had no authority to make the contract or any contract with appellee, and the county is not bound by such contract or any act done by Smith.

4. We contend that the building and repairing of all roads

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and causeways are matters over which the fiscal court has original and exclusive jurisdiction, and over which the county court has neither jurisdiction nor authority.

5. We contend that the county is a body politic; that the fiscal court is its legally organized board of directors, the supervisors of its affairs, and has the sole right and authority to exercise jurisdiction over all contracts to which the county may be a party; to prescribe the manner in which, and the terms upon which, all public utilities may be constructed and to do all things needful, especially in all matters involving the expenditure of public money, and the performance of these functions by any other body is an usurpation of authority and void.

6. We also claim in this case that the work done by appellee was done or completed according to contract.

And we ask that the judgment of the lower court be reversed.

AUTHORITIES CITED.

Ky. Stats., secs. 1840, 1834, 4306, 4339, 4335; 17 Ky., 712; Wortham v. Grayson County, 13 Bush, 53; Story on Contracts, 2d ed., part 1, chap. 1, sec. 22; Hare on Contracts, 569, 573, 585; Story on Contracts, 2d ed., part 3, chap. 1, sec. 972; Am. & Eng. Ency. of Law vol. 3, p. 892.

W. C. EVERSOLE, FOR APPELLEE.

The work in controversy was let to the lowest bidder and the appellee was awarded the contract, for which he executed bond, and finished his work about the first of March, 1902, and at the April term of the fiscal court appeared and filed his claim against the county. John Smith, who was appointed by the county court to let the contract, was a justice of the peace and a member of the fiscal court. The claim was disallowed by the fiscal court and the claimant appealed to the circuit court, which we contend was the proper thing to do, and said court allowed the claim. All the orders and proceedings taken in the county court setting aside the order appointing Smith commissioner were made without notice to appellee, and after he had about finished his work under his contract.

The testimony shows that appellee's claim is meritorious; that the work was reasonably worth more than his bid, and that the people of Perry county had accepted and was using the road he had made as a public highway and are still using it as such. He expended $280 in money for blasting powder, fuse and explosives to blast the rock out of the road, besides his own labor, and the fiscal court has accepted the road and allotted road hands on it.

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Whilst the courts, as far as the law gives them power, should protect the interest of the finances of the counties and the State, they should also protect the interests of the citizens, whose money and labor has been given to and accepted by the county, and which reason and justice demands should be compensated. Ky. Stats., sec. 978; Hudgins v. Carter Co., 72 S. W., 730.

OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

Appellee claims that Perry county is indebted to him in the sum of $400 on a contract for certain work done by him on a public highway within the county. It is shown that the fiscal court of the county had not appointed a supervisor of roads. The county judge, sitting alone as the county court, appointed 'Squire Smith a commissioner to let to the lowest and best bidder the job of blasting out a portion of a cliff, so as to cut down a hill to a proper grade for changing a county road to that point. The commissioner reported to the county court that he had let the work at a public bidding, and that appellee was the lowest and best bidder, at the price of $400, and that the work had been let out to him; and the contractor's bond was filed with the report. The commissioner did not file the report until some months after he had let the work. The county attorney immediately filed exceptions to the report. He objected to it on the ground that the county court had not jurisdiction to appoint the commissioner, or to make the contract on behalf of the county. The exceptions were sustained by the county court, and the report and action of the commissioner were not confirmed. Appellee went ahead with the work, and completed it. He filed his claim under the contract before the fiscal court, and moved its allowance. It was rejected, and he appealed to the circuit court, where the claim was allowed, and the county prosecutes this appeal.

By section 4306, Kentucky Statutes, 1899, the fiscal courts

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of the counties are given general charge and supervision of the public roads and bridges. The county court has no authority to let contracts concerning the repairs of public roads. Its jurisdiction is confined to laying the county off into road precincts, and allotting hands to work the roads, and appointing overseers. Sections 4309, 4310, Id. It may order new roads to be opened, or the routes of old ones changed. Section 4289, Id. But no authority is conferred upon it to incur any liability on behalf of the county, except the fixing of the amount of compensation to the landowners whose land is taken for the new road. In case of an emergency only can the county judge contract for the repair of a bridge owned and kept up by the county. Section 4345, Id. Section 4339, Kentucky Statutes, 1899, governs the cutting down of hills upon public roads by contract. It provides that the road supervisor, upon the order of the county judge, may let the work to the lowest and best bidder. The section concludes: "If there be no supervisor, the fiscal court may order such work done in the manner provided in this section by the county judge or a commissioner appointed by it." It is not claimed that the fiscal court of Perry county ordered this work done at all. The county judge had not authority to contract for the work on behalf of the county, except under the order of the fiscal court. The action of the county court in appointing the commissioner, as well as the act of the commissioner in letting the work to appellee, was void, being in excess of the jurisdiction of the county court. Appellee is required to take notice of the law. He is bound, at his peril, to know the extent of the authority of an agent of the county in contracting with him. All persons must take notice that a county can contract only in the manner and by the person and for the purposes expressly provided by the statute.

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The judgment of the circuit court is reversed, and cause remanded, with directions to enter a judgment for the county upon the claim and contract sued on.

CASE 65—SUIT BY JAMES A. WALLACE AGAINST J. H. HARDWICK AS GUARDIAN OF FLOYD G. CLAY, AN INFANT, ASKING FOR THE SALE OF A HOUSE AND LOT UNDER SECTION 490 OF THE CIVIL CODE.—OCT. 29.

Clay's Guardian v Wallace.

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116 599
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APPEAL FROM ESTILL CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

HOMESTEAD—RIGHT OF SURVIVING SPOUSE—SALE—ABANDONMENT.

Held: 1. Kentucky Statutes, 1899, section 1707, providing that the homestead shall be for the use of the widow so long as she occupies it, and section 1708, giving a surviving husband the same rights in the homestead of his deceased wife, do not vest a surviving husband with an unconditional vendible life estate in the homestead, but only with an estate dependent on its occupancy by him.

2. Where a surviving husband procures the unconditional sale and conveyance of his deceased wife's homestead in a suit for that purpose against her minor children, this amounts to an abandonment by the husband, and he can not claim a life interest in the proceeds.

C. F. SPENCER, ATTORNEY FOR APPELLANT.

This is a proceeding seeking a sale of a house and lot in Irvine, Ky., under section 490 of the Civil Code, the property being owned by appellee, Wallace, and the infant, Floyd G. Clay. The appellee, Wallace, and the infant's, Floyd Clay's, mother were married in 1901. A short time thereafter the wife furnished $1,000 to build a house on a lot in Irvine, then owned by appellee, in consideration of which sum appellee made a deed to his wife for a thousand-dollar interest in said house and lot. Mrs. Wallace died in May, 1902, leaving her infant son, Floyd G.

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Clay, as her only child and heir. At the time of her death the house and lot was occupied by her and her husband and the infant, Floyd, as their home. The infant, Floyd, and appellee are therefore joint owners of said house and lot, the infant having a thousand-dollar interest therein, and appellee owning the remaining interest therein. The court adjudged that the appellee has a homestead right in the interest of his deceased wife in said property and at the same time decreeing a sale of the entire property and permitting appellee to retain the $1,000 of the proceeds of the sale which belongs to the infant by executing bond for the repayment of same to the infant at the death of appellee.

We submit that this is error.

Our contention is that a homestead right is simply a right to occupy, and a sale of same is an abandonment of such right. The statute provides that the "termination of the surviving consort's right to the use of the homestead shall in no wise affect the right of the infant children," and the judgment decreeing a sale of the property if the homestead right did exist, is absolutely void and the purchaser at such sale would take the property subject to the infant's right to occupy same until the infant becomes of age.

This property being owned jointly by the husband and wife and occupied by them at her death as their home, and the proof showing that it is worth $1,500, our contention is that the husband could not claim a homestead in the $1,000 interest of his wife, but if he claimed a homestead in the joint property his own interest would be estimated in making up that exemption.

We rest the case upon the ground that the infant can not be deprived of his right to occupy the homestead by the sale procured by appellee; and that a sale of it is void as to the infant; and that appellee has lost his homestead right by procuring a sale thereof; that the interest of the surviving consort can not be sold except by agreement; and the infant can not agree; and if appellee is entitled to a homestead therein his own interest must be considered in making up that exemption; that he, having procured the sale, he is only entitled to curtesy in the proceeds; that the homestead could not be sold except for reinvestment; and it is not shown that a sale and reinvestment would be beneficial to the infant. Ky. Stats., secs. 1707, 1708; Saulsbury v. Sims, 79 Ky., 527; Phipps v. Acton, 12 Bush, 375; Miles v. Hall, 12 Bush, 105; Civil Code, sec. 489, subsecs. 5, 490, 491, 492, subsec. 4.

RIDDELL & RIDDELL, FOR APPELLEE.

The real and only contention is as to what interest appellee

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has in the $1,000 put in by his deceased wife. He is entitled to a homestead, and as the property was sold without objection appellee is entitled to the use of the money during his life upon his making the payment to the infant safe so that the money will be forthcoming at the death of appellee. The infant Floyd G. Clay, does not reside with appellee, nor does the record show that he at any time resided with appellee. His father is alive and divorced from his mother, and is entitled to the custody, care and control of him, and there is no obligation on appellee to care and provide for him and hence he has no interest in the homestead.

The act of 1894, now article 3, chapter 66, Kentucky Statutes, does not change the homestead right of the husband in the property occupied by the husband and wife jointly as a homestead, and he is not divested of his homestead right by a sale.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

The appellee, James A. Wallace, brought this suit against the appellant, J. H. Hardwick, as guardian of Floyd G. Clay, an infant, asking a sale of a house and lot in the town of Irvine, under section 490 of the Civil Code. He alleges in his petition that on the 2d day of May, 1901, he married the mother of the infant defendant, Floyd G. Clay; that a short time after their marriage the wife advanced $1,000 to be used in the erection of a dwelling house on a lot owned by him in Irvine, under an agreement that he should execute a deed to her for $1,000 worth thereof; that pursuant to this agreement, on the 19th of September, 1901, he executed a deed with covenant of general warranty for $1,000 of the value of the lot; that he and his wife and her infant son occupied the property as a home until her death on the 8th day of May, 1902; that F. G. Clay is under fourteen years of age, and then resided in Powell county, with his grandfather and statutory guardian; that, as the surviving husband, he was entitled to the use and occupation of that part of the property which belonged to his deceased wife as a homestead; that it was insusceptible of division without

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materially impairing its value; and asked that it should be sold to the highest and best bidder, and the proceeds divided between himself and the infant defendant in accordance with their respective rights. The defendant Hardwick, as statutory guardian of the infant, filed an answer, in which he denied that plaintiff was entitled to a homestead in that part of the house and lot which belonged, under his deed, to his deceased wife; and said that at the death of the wife plaintiff and her infant son were jointly entitled to the use and occupation of the property during the minority of the infant, and that when it ceased to be so occupied the infant was entitled to $1,000 in the property, and asked that the interest of his infant ward be protected. Proof was taken showing that the property was insusceptible of division, and worth about $1,500. The chancellor adjudged that the property should be sold by the master commissioner upon a day fixed by himself, after advertisement thereof as similar property is required to be advertised when sold under execution, and should take bond for the purchase price, payable to himself as commissioner;; and that out of the proceeds of the sale the defendant Hardwick, as guardian of Floyd G. Clay, was entitled to $1,000, subject to a life estate therein of plaintiff; and that plaintiff could retain the $1,000 by executing in open court a covenant to the infant defendant with good security for the $1,000, without interest, payable at his death. The defendant excepted to so much of this judgment as authorized Wallace to retain the $1,000, and has brought the case up for review.

Section 1707 of the Kentucky Statutes provides: "The homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the youngest unmarried child arrives at full age; but the

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termination of the widow's occupancy shall not affect the right of the children. But said land may be sold subject to the right of said widow and children if a sale is necessary to pay the debts of the husband." Section 1708 of the Kentucky Statutes provides that: "The homestead of a woman shall in like manner be for the use of her surviving husband, and her children situated as above; and when his and their interest ceases it shall be disposed of in like manner, and the proceeds applied on the same terms to her debts; if none, divided among her children." Under section 1708, the plaintiff, Wallace, and the infant, Floyd G. Clay, were jointly entitled to the use and occupation of the homestead of the deceased wife until the infant was twenty-one years of age. After that time Wallace was entitled to its use and occupation during his life. But the statute did not vest in him an unconditional, vendible life estate in the homestead of his deceased wife. His homestead right therein depends upon its occupation by him. Whenever he permanently ceases to occupy the homestead of his deceased wife, his right thereto ceases, and the property reverts to the heirs at law of the wife. And an unconditional sale and conveyance of the property amounts to an abandonment. See Freeman, etc., v. Mills, 101 Ky., 142, 19 R., 316, 39 S. W., 826; Bryant v. Bennett, 22 R., 1086, 61 S. W., 1001; Kimberlin v. Manson, Isaacs, etc., 23 R., 42, 62 S. W., 494. But under section 2132 of the Kentucky Statutes he is entitled to have an estate for life in one-third of all the real estate to which his wife, or any one for her use, was seised of an estate in fee simple during coverture, unless such right shall have been barred, forfeited, or relinquished.

The judgment is reversed, and cause remanded for proceedings consistent with this opinion.

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CASE 66—ACTION BY W. J. LOUGHRIDGE, &C., AGAINST MOSES BURKHART TO RECOVER LAND.—OCT. 29.

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124 50

Burkhart v. Loughridge, &c.

APPEAL FROM HARLAN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFFS AND DEFENDANT APPEALS. REVERSED.

EJECTMENT—TITLE BOND—RECORDING—NOTICE—FILING PAPERS—TRIAL.

Held: 1. A defendant in ejectment, relying on an equitable title through a title bond, can not be required to file his bond before the trial, Civil Code, section 128, provided that a writing other than an evidence of indebtedness on which a party intends to rely as evidence may be filed with the pleadings, or, by leave of court, at any time pending the action.

2. Though a title bond is recorded, the party relying on it to establish title must prove its execution affirmatively.

3. If a party in ejectment relying on a title bond to the premises does not file the bond before trial, as he may do under Civil Code, section 128, the trial court can allow the adverse party reasonable time after the bond is filed to prepare a defense.

4. A defendant in ejectment who relies on a recorded title bond which he claims is lost, but which he alleges plaintiffs had notice of, is entitled to have the issue as to notice tried, even though he does not produce the bond on the court's order to do so.

H. C. CLAY, ATTORNEY FOR APPELLANT.

This suit was instituted by appellees against appellant and his tenant to recover possession of 100 acres of land. Appellant in his answer denies title in appellees and alleges that he is the owner of the whole 100 acres by purchase from Isaac Ingle, who purchased same from Wm. Turner, Sr., and took from him a title bond July 5, 1874, which bond Ingle assigned to appellant November 22, 1900, but same has been lost or misplaced and could not be produced, and by reason of that fact appellant was not permitted to make any defense to the action and judgment was rendered for plaintiffs on their motion without any evidence of title in them, and of this ruling of the court appellant complains and is asking a reversal.

The rule is well settled and needs no authority that in eject-

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ment suits the plaintiff must recover on the strength of his own title and not on the weakness of the defendant's title.

Although the defendant denied the plaintiff's title to the land, and claimed to be the owner himself, under title bond, the plaintiff without attempting to show title in himself, asked for and obtained a rule against the defendant to produce his title bond which he alleged had been lost, and because he could not produce it, the plaintiff, without any show of title in himself, and in the face of defendant's denial of title in plaintiff, the court adjudged the land to the plaintiff. This was manifest error which should be reversed.

AUTHORITIES CITED.

Preston v. Roberts, &c., 12 Bush, 578; Am. & Eng. Ency. Pl. & Pr., vol. 8, 739; Green v. Wilson, 8 R., 601; Davis v. Justice, 8 R., 258; Ratcliff v. Elam, 14 R., 772.

H. E. ROSS, ATTORNEY FOR APPELLEES.

W. J. Loughridge and others, in the year 188—, purchased at decretal sale at the Harlan courthouse 6,500 acres of land sold at the suit of the heirs of William Turner, Sr., who died in 1880, for which a deed was made to the purchaser for said heirs. The purchasers took possession under said deed and has held the same ever since until about a year before the bringing of this suit, when appellant entered the premises, claiming the tract in controversy by reason of a title bond said to have been executed by Wm. Turner, Sr., to Isaac Ingle, July 5, 1874, and transferred to appellant November 22, 1900, and recorded in the county clerk's office of Harlan county January 9, 1901. The answer sets up the title bond and alleges it has been lost. Upon filing the answer, plaintiffs asked for a rule against the defendant to produce the bond, to which response was made that it had been lost or misplaced and could not be found after search, and sets out that he had caused it to be recorded in the clerk's office aforesaid. The response was denied and plaintiff alleged that the bond was a forgery which was denied. Proof was heard upon this issue as to the bond, and upon the conclusion of the testimony on motion of appellee, the court struck the pleading from the file and directed a judgment to be entered for the appellee.

We contend the judgment of the court was proper in striking the answer from the file. The defense is so frivolous and such an apparent scheme to defraud appellees of their land that the court should not lend its assistance to appellant in attempting to further its schemes by reversal of this action.

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OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

In this ejectment suit brought by appellees against appellant, the latter set up claim of an equitable title to 100 acres of land by reason of a title bond alleged to have been executed by appellees' grantor, Wm. Turner, Sr., in 1874. Appellant claimed in his answer that the title bond had been executed by Turner July 5, 1874, to one Ingle, and assigned by the latter to appellant in 1900; that owing to the loss of the title bond it could not be filed. Appellees claim by derivation from Turner's heirs. Appellant also averred that appellees had notice and knowledge of Ingle's claim when they bought from Turner's heirs. Appellant was ruled by the court to file his title bond with his answer. He responded that he could not because it was lost or misplaced, and after diligent search he was unable to find it, and did not know where it was. Appellees controverted the response, and pleaded that the alleged bond was a forgery, and was a part of a fraudulent scheme of appellant's and Ingle's to steal the timber from the land. The circuit court heard proof at the bar concerning the alleged loss of the bond. Appellant testified that he had lost it since he had had it recorded in the county clerk's office. His statements do not entirely satisfy the mind, and in some features tend to discredit his good faith in the matter. The circuit court made the rule absolute, and appellant failing to file the bond, his answer was stricken from the files, and judgment entered against him on the merits of the case. We are of opinion that the court erred in these rulings.

In the first place, appellant was not compelled to file the alleged bond before the trial of the action, or at least before some evidence was introduced by him bearing on its genuineness. This bond or paper was only evidence of ap-

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pellant's title, as a deed or other writing, tending to show title, might have been. A party is not required to file his title papers before the time of trial, but may do so. Section 128, Civil Code. The only papers which a party is required to file with his pleadings are those mentioned in section 120 of the Civil Code, to-wit: "If an action, counter-claim, set-off or cross-petition be founded on a note, bond, bill, or other writing as evidence of indebtedness, it must be filed as part of the pleading, if in the power of the party to produce it; and if not filed, the reason for the failure must be stated in the pleading; if upon an account, a copy thereof must be filed with the pleading." Under the old Code, section 155 required that, "if either party shall rely upon any deed or other writing, he shall file with his pleading the original deed or writing if within his power," etc. It was also provided that when filed they should "remain on file for inspection of either party until allowed to be withdrawn by the court." The present Code contains no such provisions.

It is true the genuineness of the bond relied on by appellant is attacked. Unlike a deed duly acknowledged and certified, or an official copy of such deed, the instrument does not prove itself, but its execution by the putative makers must be shown affirmatively by the party relying on it or claiming under it. Its being recorded as allowed by section 500 of the Kentucky Statutes does not change this rule. This section of the statute was not enacted to enable the transfer of title to real estate by title bonds, as is done by deeds. Nor was it designed to change the rules of evidence as to the genuineness of such papers. It was only to give notice to future creditors and purchasers of the equity created by the bond. The bond remained only a bond to be enforced, rescinded, or defeated by the parties to it, or by any other person affected by it, as if it had never been recorded. Its

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being recorded imparts to the bond no more legal force, except as serving as a notice to creditors and purchasers, than if it were not recorded. If the party claiming under a title bond fails to avail himself of the provision of the Civil Code (section 128) allowing him to file it in advance as evidence on his behalf, the trial court has it in his power to allow the other party reasonable opportunity after it is filed to contest its genuineness and to prevent surprises.

In the next place, appellant was entitled to a trial of the issue tendered to the effect that appellees knew of the existence of this claim and title in Ingle when they bought. If they did know of it, then they could not be innocent purchasers, and protected against it as such.

The judgment is reversed, with directions to set aside the judgment as well as the order striking appellant's answer from the files, and for further proceedings not inconsistent herewith.

CASE 67—ACTION BY PECK-WILLIAMSON HEATING AND VENTILATING COMPANY AGAINST THE CITY OF LUDLOW FOR BREACH OF CONTRACT. —OCT. 30.

City of Ludlow v. Peck-Williamson Heating and Ventilating Co.

APPEAL FROM KENTON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

MUNICIPAL CORPORATIONS—CONTRACTS—STATUTORY AUTHORITY—REMOVAL—EFFECT OF CONTRACT—MEASURE OF DAMAGES.

Held: 1. Where a city contracted, as it had authority to do, for a heating plant for a schoolhouse, no subsequent legislation remov-

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ing such authority from the city could relieve it from liability on the contract.

2. In an action for breach of contract to purchase a heating plant it was proper to refuse to admit evidence as to whether the heating plant would have operated as it had been warranted to do.

3. Where the seller of a heating plant agreed to furnish repairs for castings for the furnace for a period of ten years in an action by him for damages because of the purchaser's failure to consummate the contract the measure of damages was not merely the difference between the contract price and what it would have cost plaintiff to have put in the plant, but there should have been deducted such sum as would be sufficient to furnish the repairs, such cost being neither vague nor speculative.

FURBER & JACKSON, ATTORNEYS FOR APPELLANT.

We base our right to have this verdict and judgment set aside because:

1. The court erred in fixing the measure of damages.

2. The court erred in refusing to permit the introduction of evidence on the part of appellant as to the costs of making repairs on the furnace.

3. The court erred in refusing to permit the appellant to show that the furnace, if built, could not carry out the terms of the contract.

4. The court erred in refusing to give the instructions offered by appellant.

5. The court erred in the instructions given to the jury.

The appellee claims $1,789.84 damages on a contract that called for an expenditure of $2,665, and say the legitimate profit would have been the difference between $2.665. the contract price, and $875.66, the cost of installing the plant, or, in other words, the appellee company was to make a profit of $200 per cent. on this contract.

If this be true we submit, as a matter of public policy, to prevent, as far as possible, corruption in municipal affairs, courts of justice should not lend their aid to the recovery of such outrageous profits.

We contend that the whole contract should be considered as an entirety, including that part which states: "We guarantee castings and will furnish repairs for the same which may be needed, free of cost, for a period of ten years following."

If the appellant can not show the cost of repairs and that the furnaces are incapable of fulfilling the contract, as matters of defense, then that renders the entire contract uncertain and indefi-

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nite, and makes any damages that appellee could recover merely a matter of speculation. The damages in this case should not be vindictive, but simply compensatory.

CASES CITED.

1. *The whole contract must be considered.* Beech on Modern Law of Contracts, sec. 711; Anson on Contracts, 2d Am. ed., 330; Francis v. Shearer, &c., 13 R., 285.

2. *An unconscionable contract.* Rittenhouse v. Mayer, 25 Md., 336.

3. *Repairs and furnaces incapable of carrying out contract.* J. N. Kramer & Son v. Messner & Co., 101 Iowa, 88; Sedgwick on Damages, sec. 90, p. 126; Royalton v. R. & W. Turnpike Co., 14 Vt., 311.

4. *Measure of damages.* Talcott v. Cupper, 52 Mich., 633; Freeman v. Clute, 3 Barb. N. Y., 427; Skinner v. Dayton, 19 Johns. N. Y., 513; Thomas Burgen v. City of New Orleans, 35 La. Ann., 523; Sedgwick on Damages, 8th ed., sec. 170; Adams Express Co. v. Egbert, 36 Pa., 360; Jarrard v. Hill, 14 R., 575; W. T. Adams Machinery Co. v. Looney, 47 S. W., 670; Anson on Contracts, 2d Am. ed., p. 407; Hadley v. Baxendale, 9 Exch., 355; Shouse v. Nelswaanger, 18 Mo. App., 245; Hammer v. Shoenfelder, 47 Wis., 318; Shephard v. Milwaukee, &c., 15 Wis., 318; Ill. Cent. R. R. Co. v. Cobb, 64 Ill., 128; Fleming v. Beck, 48 Pa. St., 312; True v. International Tel. Co., 60 Me., 25; Culling v. Grand Trunk R. R. Co., 13 Allen, 385; Hurd v. Densmore, 63 N. H., 171; Buffalo Barbwire Co. v. Phillips, 64 Wis., 338; H. & T. C. Ry. Co. v. Hill, 63 Tex., 385.

W. H. MACKOY AND C. B. MATTHEWS, FOR APPELLEES.

The object of this action was to recover damages on two specified contracts to install in a schoolhouse which appellant proposed to build a heating and ventilating apparatus and a dry closet apparatus, which appellee was prevented from performing by the act of the appellant, the contract price for the two being $2,665, and which the appellee was at all times willing, ready and able to perform and offered to perform.

As to appellant's defenses, we submit that neither a Constitution, nor a subsequently enacted statute can be so construed as to impair the obligation of a contract that was valid under the law in force at the time the contract was made.

The only question in the case is as to the measure of damages which the appellee sustained by the breach of the contracts by the appellant. The other defenses are mere makeshifts.

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The lower court charged the jury as follows: "The measure of damages is the difference between the contract price and what it would have cost to complete the work by plaintiff at the date of the breach of the contract."

That this is the law applicable in such cases would seem to be beyond question.

As against the damages claimed by appellee there can be no set-off for conjectural losses for a period of ten years for repairs to the furnaces; nor did the lower court err in its refusal to permit to go to the jury testimony tending to show what such conjectural losses would have been, nor in refusing to give an instruction with reference thereto.

CLASSIFICATION OF QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. Statement of facts.

2. The issues in the case.

3. That the appellant had full and complete power and authority under its charter to enter into the contracts for the breach of which it was sued. Original charter of Ludlow, enacted February 9, 1864, sec. 12; amendment to charter of Ludlow, enacted April 19, 1890; Acts of 1889-90, vol. 2, chap. 921, p. 1013; Ky. Stats., sec. 3481.

4. That the measure of damages of the appellee in this case is the difference between the contract price and what it would have cost to complete the work by plaintiff at the date of the breach of the contract. Sedgwick on Damages, 8th ed., vol. 2, secs. 618, 609, 611, 613; Devlin v. Mayor, etc., of N. Y., 63 N. Y., 8, 24, 25; Cook v. Comrs. of Ham. Co., Ohio, 6 McLean, 612; Mason v. Ala. Iron Co., 73 Ala., 270; Hale v. Trout, 35 Cal., 229; Leonard v. Beaudry, 68 Mich., 312; Masterton v. Mayor, 7 Hill (N. Y.), 61; Nilson v. Morse, 52 Wis., 240; Nash v. Hoxie, 59 Wis., 384; Singleton v. Wilson, 85 Tenn., 344, 346; E. & P. Ry. Co. v. Pottinger, 10 Bush, 185; Hill v. Hager, 7 Ky. Law Rep., 518; Tandy v. Hatcher, 9 Ky. Law Rep., 150; Blood v. Herring, 22 Ky. Law Rep., 1725; Bluegrass Cordage Co. v. Luthy & Co., 98 Ky., 583, 590; The Hauser, Brenner & Fath Co. v. Tate & Co., 105 Ky., 701; Goodrich v. Hubbard, 51 Mich., 62, 63; Crescent Mfg. Co. v. Nelson Mfg. Co., 100 Mo., 325; Black River Lumber Co. v. Warner, 93 Mo., 374.

5. Review of testimony upon the question of damages.

6. That when a contract is broken before the time for full performance has expired and the cost of doing the work has fallen meanwhile, plaintiff is entitled to recover what difference there is to his advantage. Goodrich v. Hubbard, 51 Mich., 62, 63.

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7. That the brief of counsel for appellant in this case in making charges which are not supported by and can not be inferred from the record in this case is scandalous, and the conduct of appellant's counsel in that regard deserves and should receive the severe censure of this court.

8. Conjectural losses which appellant, a wrong-doer, claims it might have sustained if it had permitted the contracts to be performed, uncertain in their character, which had not accrued either at the commencement or at the trial of this action, and which are not pleaded, can not be set off as against appellee's claim for damages, nor be permitted to reduce the same, and that the rulings of the lower court in excluding evidence in regard thereto were correct. Davis v. Garrett, 6 Bingham., 716; 19 E. C. L., 212; Eng. & Am. Ency. of Law, vol. 8, 2d ed., 610; Keith's Executor v. Hinkston, 9 Bush, 283, 284, 285; Bank of Hopkinsville v. Western Ky. Asylum, 21 Ky. Law Rep., 1821. 1823; Epenbaugh v. Gooch, 15 Ky. Law Rep., 576; Smith v. Phillips, Jr., 16 Ky. Law Rep., 615; Ky. Tobacco Assn. v. Ashby, 9 Ky. Law Rep., 109; Miller v. Burch, 19 Ky. Law Rep., 629, 631.

9. Review of cases cited in brief of appellant's counsel.

OPINION OF THE COURT BY JUDGE BARKER—REVERSING.

The appellee is a corporation organized under the laws of the State of Ohio. In 1890 its corporate name was Bennett & Peck Heating and Ventilating Company—subsequently changed by law—and in that year it entered into a contract with appellant by which it agreed to manufacture and install in a public school building then contemplated being erected by the municipality a system of air furnaces for the purpose of heating it in winter, for which it was to be paid the sum of $2,170. At the same time it made another contract with appellant, by which it agreed to place in the school building a dry-closet apparatus, for which it was to be paid the sum of $495. These contracts were in writing, and are filed as exhibits with the petition. They contain the following guaranty: "We guarantee the castings, and will furnish repairs for the same, which may be needed, free of cost for a period of ten years following." "We guarantee to heat all

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parts of the building to 70 degrees Fahr., or comfortable occupancy in the coldest winter weather." "We guarantee to change the air in the whole building at least four times per hour, or, in other words, to keep up continuous supplies of fresh air in each room, so that the same shall be replaced once in every fifteen minutes." "We guarantee that there shall be no back-draughts from the dry closets into the school rooms, and that there shall be no connection between the ventilation of the rooms and the ventilation of the dry closets." On March 3, 1893, the appellee addressed the following letter to appellant: "To the Mayor and Board of Council, Ludlow, Ky.—Gentlemen: We have been holding for some time a contract given us by your Honorable Body, for erecting our complete system of warming, ventilation and dry closet in the proposed new school building which your city proposes to erect. We wish to notify you of our readiness at any time to carry out this contract, and hope that the new Board, which we understand has just been elected, can now see their way clear to commence the erection of the building. We will be glad to hear from you in this connection. Very truly yours, George Peck, Pres't." To which the following response was made: "City Clerk's Office, Ludlow, Ky. April 29, 1903. Bennett & Peck; Heating and Ventilating Co., Cincinnati, Ohio—Gentlemen: Your letter of recent date advising us that you are holding contract for the placing of your system of heating and ventilation in the proposed new school house in this city came duly to hand. I am instructed, as city clerk, to inform you that your system will not be adopted nor placed in said schoolhouse when we order. Yours truly, J. C. Richardson, City Clerk." After the receipt of this letter, appellee instituted this action in the Kenton Circuit Court, setting out the contract, and its breach, and praying judgment for damages therefor in the

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sum of $1,840. To this appellant filed an answer, setting out a number of defenses, to some of which demurrers were sustained; and finally, under order of court, it filed a reformed answer, in which it denied the incorporation of appellee, or that it had ever been ready or willing to comply with its contract, and alleging that the contract had been mutually abandoned, and had become null and void; that the same had been entered into with reference to the issuance of certain bonds of the city, from the proceeds of which funds were to be raised to carry out the contract, and that afterwards the city had been required, by an act of the General Assembly of the Commonwealth of Kentucky, to turn over the entire proceeds of the bonds to the board of education of the city, and that it now had no funds with which to carry out the same; that the entire matter of building and furnishing the school building in question had, since the making of the contract, been placed by law in the hands of the Board of Education. The answer further denied that appellee had been damaged in the sum of $1,840, or in any other sum. The issue having been made up by a reply, a trial was had by jury, which resulted in a verdict in favor of appellee in the sum of $1,165, of which appellant is now complaining.

The making of the contract and the authority so to do at the time it was entered into by the parties, was not, and could not be, denied. The proper incorporation of appellee under the laws of the State of Ohio, while placed in issue by the pleadings, was abundantly established by uncontradicted evidence. The municipality having authority to make the contract in question, and having made it, no subsequent legislation could abrogate or invalidate it, and therefore no change by legislative enactment in the status of the city, with reference to the control of the school building, could alter

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its responsibility to appellee under the contract. This has been elementary since the Dartmouth College case. Appellee fully established its willingness and ability to perform the contract, and as to this there was no contrariety in the evidence. There is no allegation of fraud or corruption in reference to the making of the contract, either in the pleading or the proof; and the breach, so far as the record shows, was wanton and arbitrary. The court, at the close of the testimony, properly instructed the jury peremptorily to find for appellee, and there was no error in its refusal either to allow evidence or to instruct the jury upon the question as to whether or not the furnaces could or would, if built and installed in the school, carry out the terms of the contract. This contention of appellant is based upon the guaranty that the furnaces, when installed, would keep the building sufficiently heated for comfortable occupancy during the coldest winter weather. We think this question too vague and speculative for consideration. Appellee had guarantied in the contract what its furnaces would do when installed in the building. This guaranty had been accepted by appellant as sufficient. It could not, in the face of its arbitrary and wanton breach of the contract, go into a speculation as to whether or not the furnaces would have complied with the guaranty.

But we think the court erred in giving the measure of damages in instruction No. 2, which is as follows: "The measure of damages is the difference between the contract price and what it would have cost to complete the work by plaintiff at the date of the breach of the contract." There should have been added to this: "Less such a sum as will be reasonably sufficient to furnish repairs for the castings of the furnaces, operated with ordinary care, for a period of ten years." In Sedgwick on Damages (section 618) it is

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said: "Where one engaged in the performance of a contract is wrongfully prevented by the employer from completing it, the measure of damages is the difference between the price agreed to be paid for the work and what it would have cost the plaintiff to complete it. Differently stated, the rule in such a case is recompense to the plaintiff for the part performed and indemnity for his loss in respect to the part unexecuted. The plaintiff is to be placed in the same condition he would have been in if he had been allowed to proceed without interference." In the Am. & Eng. Encycl. of Law (2d Ed.) 1116, the rule is thus stated: "In the cases of contract for the sale of articles to be manufactured, the actual damages suffered are the measure of recovery, and is frequently the difference between the cost of manufacturing and delivering the goods and the contract price; that is, the profit which the plaintiff would have made if the contract had been fully performed." In the case of Hauser, Brenner & Fath Co. v. Tate & Co., 105 Ky., 701, 20 R., 1716, 49 S. W., 475, the court said: "The general rule is that the measure of damages for breach of an executory contract includes loss of profits which grow out of the contract, and which would have been realized from its full performance." In the light of these authorities, which we deem to state the correct rule, what would have been appellee's profit on the contract if it had been allowed to proceed to its full performance? Manifestly, it would have been the difference between the cost to it of properly installing its system of heating and ventilation, etc., in the school building and the contract price, less such a sum as would reasonably keep the castings of the furnaces in repair during the contract period of ten years. This cost of repairing the castings is neither vague nor speculative. Common experience teaches that they would need repairs

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from year to year, and under the contract this expense was to be borne by appellee. Its profit upon the whole contract, therefore, can not be ascertained without deducting the reasonable value of these repairs during the contract period. We think, therefore, the court erred in refusing to submit the question of repairs of the castings in the instructions to the jury.

For the reasons indicated, the judgment is reversed for proceedings consistent with this opinion.

CASE 68—PROSECUTION AGAINST WILLIAM ROWSEY FOR MURDER.—OCT. 30.

Rowsey v. Commonwealth.

APPEAL FROM BOYLE CIRCUIT COURT.

DEFENDANT CONVICTED AND APPEALS. AFFIRMED.

MURDER—APPEAL—REVIEW OF EVIDENCE—MALICE—SELF-DEFENSE—BELIEF OF NECESSITY FOR SHOOTING—APPARENT DANGER—DYING DECLARATIONS.

Held: 1. The court, on appeal in a criminal case, can not reverse for insufficiency of evidence if there is any evidence conducing to show the guilt of accused.

2. Evidence that defendant shot deceased while deceased was with a girl named J., after using offensive and overbearing language and conduct towards deceased; that, a few days before, he had said to a man who was with J.: "J. won't let me go with her, and by ——! you shall not go with her;" that, just before going where deceased was, he told a person to "Take your knife along. I am going to raise such a smoke . . . that you will need a knife to cut it away"—is sufficient to show that the real basis of his conduct was jealousy, and to prove malice.

3. Whether defendant believed there was necessity for shooting deceased to protect himself, and whether there were reasonable grounds for the belief, are questions for the jury.

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4. An instruction that if deceased began the fight, and defendant had "reasonable grounds to believe," and did believe, that he was in immediate danger, and he shot to avert it, he was entitled to an acquittal, embraces the idea that, if there were such appearances of danger as to beget in defendant's mind a reasonable belief of actual danger, he was entitled to an acquittal, whether the appearances were real or not.
5. The right to kill in self-defense depends on there being no other apparently safe means of averting the impending danger.
6. Statement of deceased at the time of making declarations that he had no hope of recovery, and was preparing to meet his Maker, taken in connection with the desperate character of his wounds, is sufficient evidence that he was conscious of his approaching death to make his declarations admissible as dying declarations.

ROBERT HARDING AND RAWLINGS & VORIS, ATTORNEYS FOR APPELLANT.

The grounds on which we rely for a reversal in this case are:

1. Because the verdict is flagrantly against the law and testimony.

2. Because the court erred in giving instructions Nos. 1 to 5 to the jury over appellant's objections.

3. Because the court erred in admitting the affidavit called dying declarations of Sam Mastin to be read as evidence to the jury over appellant's objection.

4. Because the court permitted, over appellant's objection, the witnesses Ella Glasscock, Mr. Glasscock, and Jess Mastin to testify and detail conversations they claim to have had with Rowsey, which in no way relate to the deceased or this case, and are highly prejudicial to appellant.

5. Because of the discovery of new testimony after the trial that is of material benefit to appellant's case.

We submit that it was error in the court to give an instruction to the jury on the question of murder, in the absence of any evidence showing malice or any ill feeling prior to the shooting, such instruction being misleading to the jury and prejudicial to the appellant.

The dying declarations were written at a time when deceased was in no immediate danger of dying. They were written on the 14th of May, 1902, and he died on the 9th day of June thereafter. He says in it: "I have given up all hope of getting well. I make this as a dying declaration. I am soon to meet my Maker."

We submit that a verdict for twenty-one years in the peniten-

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tiary under the evidence in this case is harsh and cruel in the extreme, and entirely unwarranted by the testimony in the record.

C. J. PRATT AND M. R. TODD, ATTORNEYS FOR APPELLEE.

We do not deem it necessary to recite the testimony for the Commonwealth, which, to our minds, thoroughly justifies the verdict.

The jury were the judges of the testimony and have found the defendant guilty, and this court has frequently held that it will not reverse a verdict of guilty if there is any evidence to support it.

We insist that there is ample evidence in the record to warrant the giving of the instruction for murder. The appellant sought the difficulty and made threats against the deceased, after inviting the attack, and also evidence showing that appellant fired the first shot.

The dying declarations were made with full consciousness of impending death and hence admissible. Kennedy v. Com., 77 Ky., 353; Farris v. Com., 77 Ky., 363; Meredith v. Com., 57 Ky., 76; Ireland v. Com., 22 R., 478.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—AFFIRMING.

This is an appeal by William Rowsey from a judgment of the Boyle Circuit Court sentencing him to twenty-one years' confinement in the penitentiary for killing Sam Mastin by shooting him with a pistol. The testimony discloses that the accused, Rowsey, and the deceased, Mastin, had attended Sunday school at a schoolhouse in Boyle county, and that, after the Sunday school was over, they, in company with several other young persons of both sexes, were walking up the public highway towards their homes, laughing and talking; that the deceased, Mastin, was walking by the side of Eliza Johnson, carrying her Bible, and the accused was walking immediately behind them, with Jack Johnson, a brother of Eliza Johnson, and Jess Mastin, a cousin of the deceased; that, after the party had walked some distance, Rowsey, who appeared to have been drinking, remarked to

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Sam Mastin, "Sam, I did not know that you were a preacher," or, as detailed by another witness, "I see you have your Bible. Are you going to preach?" that Mastin replied, "I don't think I was cut out for a preacher," and asked Rowsey what had become of the team of horses which he had when he helped him to load some telegraph poles; that Rowsey responded, "Do you want pay for your work?" and Mastin replied, "No;" and that Rowsey responded, "You needn't get mad about it, for I can whip you on the ground that it takes for you to stand on." At this point a shot was fired. Eliza Johnson says that she did not know who fired it, but that she then looked at Mastin, and saw him fire at Rowsey, and that Rowsey immediately replied with two shots and Mastin fell. Jack Johnson testified that the first shot was fired by Rowsey into the ground, and that Mastin then fired his pistol at Rowsey, and then Rowsey fired two shots in quick succession. Jess Mastin testified that he could not tell who fired the first shot, but that, after he heard it, he saw Sam Mastin draw his pistol and shoot Rowsey, who threw up his hands and said, "Don't do that, Sam;" that Mastin then dropped his pistol to his side, turned, and walked eight or ten feet away before Rowsey fired two shots at him. He also testified that a week before the shooting, while he was with Eliza Johnson, Rowsey said to him, "Eliza Johnson won't let me go with her, and by God! you shall not go with her." Ella Glasscock testified that, on the afternoon before she started to Sunday school, the accused said to her: "Take your knife along. I am going to raise such a smoke over in the hollow that you will need a knife to cut it away." The testimony of the defendant is not materially different from that of the witnesses for the Commonwealth as to the location of the parties, and he admits saying jokingly to the deceased that "you need not get mad about

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it. If you do, I can whip you." He says that in response to this remark, the deceased drew a pistol from his right-hand pocket and immediately fired upon him, and that he thereupon drew his pistol and fired two shots at the deceased, and that he shot in self-defense; that the ball from the deceased's pistol struck his left arm and passed into his side. He also testifies that, immediately after Mastin fell to the ground, he took off his coat, folded it up, and put it under his head, and said to him, "Sam, you shot me first, didn't you? I never would have shot first;" and that the deceased responded: "Yes; I shot you first;" that he then went to Parksville to see a doctor, and that, after he had dressed his wounds, he sent him to care for the deceased. Dr. Pittman testifies that he dressed the wounds both of the accused and of the deceased; that the accused was shot through the left arm, between the elbow and wrist, the bullet passing into the left side of his body, about where his suspenders were fastened to his pants; that he found two bullet holes near the center of the back of the deceased, and over the spine; that the shooting took place on the 11th day of May, 1902; and that Mastin died on the 9th of June thereafter. Before his death, Mastin made a dying declaration, which was reduced to writing.

The first ground relied on for reversal is "that the verdict of the jury is flagrantly against the law and evidence." In response to this contention, it is enough to say that it has been often held that, under sections 271, 340, Code Criminal Practice, this court has no power to reverse a judgment of conviction in a criminal case upon the ground that there was not sufficient evidence to sustain the verdict, but is restricted to the single inquiry whether there was any evidence before the jury conducing to show the guilt of the accused. We think it sufficiently appears from

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the summary of the evidence quoted supra that there was evidence conducing to show the guilt of the accused, and this question was properly left by the trial court to the decision of the jury.

The next ground relied on is that the trial court erred in instructing the jury as to the offense of murder, it being contended that there was absolutely no proof of malice; and in connection with this alleged error it is insisted that the trial court erred in permitting Jess Mastin to testify to the alleged conversation with the accused in regard to going with Eliza Johnson on the Saturday night preceding the killing, and in not excluding the testimony of Ella Glasscock and her father to the effect that Rowsey said on his way to the Sunday school "that she had better take a knife to cut away the smoke," upon the ground that there is no proof that in either conversation the defendant had any reference to Sam Mastin. There is no direct testimony of any previous bad feeling between the deceased and the accused. The only suggestion in the testimony as to a probable motive for hostility on the part of the defendant towards the deceased previous to the homicide is that of Jess Mastin, and this testimony is competent as throwing light on the defendant's motive for his conduct immediately preceding and at the time of the shooting. Jealousy is among the strongest and most uncontrollable of the human passions, and the facts on which it rests are always competent, in the absence of any other assignable motive, to show whether it was the cause of the accused's act. See Wharton on Criminal Evidence, section 784; McCue v. Commonwealth, 78 Pa., 185; 21 Am. Rep., 7. And the testimony of the Glasscocks, father and daughter, we think, is clearly competent to show previous malice. When we connect the threats testified to by these witnesses with the offensive and overbearing language and conduct of the defend-

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ant towards the deceased, who was at the time in company with Eliza Johnson, it is easy to believe that the real basis of his conduct was jealousy arising from apparent preference on the part of Eliza Johnson for the deceased over himself, and they furnish sufficient evidence of malice, taken in connection with the other evidence, to justify an instruction on murder.

Counsel for the defendant also complain of instruction No. 4, on two grounds: (1) That it leaves out of view the defendant's right to shoot, based upon apparent danger; (2) and that it makes the jury the final judges as to whether the defendant believed, and had reasonable grounds to believe, that the means resorted to by him to protect himself from impending danger were necessary at the time he fired the fatal shot. Whether there was actual necessity for resort to the means used by the accused was a question to be decided by him at the time, and if he in good faith believed, and had reasonable grounds for believing, that his only safety was to shoot the defendant, he was excusable. But whether this belief actually existed in his mind at the time of the shooting, and whether there were reasonable grounds for this belief, is always a question for the determination of the jury. See Meridith v. Commonwealth, 57 Ky., 49. The instruction is drawn with special application to the facts deposed to by the defendant as excusing his action. It tells the jury "that if Mastin began the fight by first shooting the defendant, and that the defendant had reasonable grounds to believe, and did believe, from the acts and conduct of Mastin, that he was in immediate danger of suffering the loss of his life or great bodily harm at the hands of Mastin, and that he shot Mastin to avert that danger, that he was entitled to an acquittal." The defendant testified that Mastin began the fight by shooting first, and that he only shot because he be-

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lieved he was in danger of death or great bodily harm at the hands of deceased. The defendant's right to an acquittal is made to rest in this instruction upon his belief, based upon reasonable grounds, and not upon the actual existence of facts which produced the belief. The words "reasonable grounds to believe" embrace the idea that, if there were such appearances of danger as to beget in the mind of appellant a reasonable belief of actual danger, he was entitled to an acquittal, whether the appearances of danger were real or not. And this seems to be in conformity with the rule announced in Kennedy v. Commonwealth, 77 Ky., 353, and many other cases. In fact, the instruction is more favorable to the defendant than a strict construction of the law authorized, as it does not tell the jury that the right of the defendant to kill the deceased depended also upon the additional fact that there was no other apparently safe means of averting the then impending danger. See Farris v. Commonwealth, 8 R., 714, 1 S. W., 729. We conclude, therefore, there was nothing in this instruction prejudicial to the defendant.

The appellant also complains that the court erred in admitting the dying declaration of the deceased, for two reasons: (1) Because the testimony did not sufficiently show that the deceased had given up all hope of recovery; (2) because it was not limited to the immediate circumstances surrounding and connected with the shooting. The statement of deceased was written out by the county attorney of Boyle county, and two witnesses who were present at the time it was prepared and signed testify that Mastin said at the time that he had no hope of recovery, that he was preparing to meet his Maker. Taken in connection with the desperate character of his wounds, we think these declarations were sufficient evidence that he was conscious of his approaching

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death and made the declaration admissible. See Jones v. Commonwealth, 20 R., 355, 46 S. W., 217. While there are some words in the statement that did not strictly refer to the circumstances of the killing, we are of the opinion that they could not have been prejudicial to the accused in the mind of the jury.

Upon the whole case, after a careful reading of the testimony, and consideration of the arguments of counsel, we have reached the conclusion that we would not be justified in disturbing the judgment of the lower court. Judgment affirmed.

CASE 69—ACTION BY R. W. BUCHANAN AGAINST R. W. RILEY FOR USE OF A PASSWAY.—NOV. 6.

116 625
122 355
123 299

116 625
126 495

Riley v. Buchanan.

APPEAL FROM HARDIN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

PASSWAY—DEDICATION—ESTOPPEL—IMPLIED ACCEPTANCE—LONG USER—PRIVATE WAY—PRESCRIPTION.

Held: 1. A private passway can be acquired by prescription only by adverse user by the claimant or his predecessor for at least fifteen years.

2. An owner of realty, who allows the public to use it as a highway, under a notorious claim of right, for a long period of years, is estopped from denying a dedication to the public.

3. A dedication of a highway may be impliedly accepted by long-continued user by the public.

J. P. O'MEARA, ATTORNEY FOR APPELLANT.

1. Appellee owned the land but five years. He could claim no prescription *que estate* unless it was claimed by his grantors. His immediate grantor was Horace Nall, who owned the land for

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eighteen years. Jake Nall owned it prior to Horace, and before that Lewis Nail, father of Jake Nall, was the owner. This ownership of the Nails existed for about half a century. All of them disclaim any right adverse to appellant's title. Therefore, the grantor claiming no title, the grantee can claim none. The farm owned by appellee lies along a county road. By the public road he can reach all points on this county road. The presumption of long use is a presumption of fact and not of law. If Horace and Jake Nall were dead or their testimony not obtainable, then, within certain bounds, this presumption of fact might be indulged.

Presumptions of fact are only substitutionary, resorted to only when no better evidence can be obtained. The essential fact is the intention with which the use was accompanied. When the person using actually disavows any adverse intention, then we have no further use for presumptions.

2. If appellee claimed the right to use the passway adversely before he bought the Nall land, he must have claimed it either as a personal prescription through his ancestors, or as a prescription *que estate*. He does not claim through his ancestors at all, and this leaves him only a claim *que estate*. If his claim is *que estate* it is not severable from the estate, and having conveyed away the estate, his right has gone with it. Therefore, on a question of private right he has no standing.

L. A. FAUREST AND W. H. MARRIOTT, ATTORNEYS FOR APPELLEE.

It is well settled in this State that a continuous use of a passway by a land-owner as a means of access to his land for a period of fifteen years raises a presumption that it was used under a claim of right, and is sufficient to establish a prescriptive right to the passway unless it is shown by the owner of the servient estate that the use was permissive.

In this case we proved that this passway had been used by the owners of the land, now owned by appellee, continuously, notoriously and openly for at least fifty years, and there is no proof that any part of such use was permissive.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

This appeal involves the sufficient dedication of a public highway. Appellee claims that he, as a member of the public, has the right to use a certain designated passway over appellant's land. He also claims the right to use it as a pri-

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vate passway. But the record shows that he has owned the adjacent land to which it is claimed as an appurtenant for only about five years. His vendor did not claim the right to use this passway, although he owned the land for fifteen years.

The doctrine in this State of acquiring private passways by prescriptive use, requires a continuous adverse user by the claimant, or by him and those under whom he holds, for at least fifteen years. O'Daniel v. O'Daniel, 88 Ky., 185, 10 R., 760, 10 S. W., 638. Appellee's standing is alone upon the claim of the right of the public, of which he is one. It is clearly established that the passway in question has been used by the public for purposes of neighborhood travel, for travel to and from a church, and for much of the time to and from a railway station and post-office, for more than fifty years. The use has been at the pleasure of the public, without let or hindrance from the owner of the servient estate, and by all means and for all purposes of travel. There are other roads that might be, and that frequently are, used by the public in passing between the same points. But this way is most traveled by a certain neighborhood to reach the points mentioned. The circuit court held that the passway was a public highway, used for such a length of time by the public as to raise a presumption of its dedication to the public by the original owner.

Counsel for appellant insists that the judgment is erroneous, because, he asserts, a right in the public can not be created by prescription; also that a dedication of a road to the public, to be valid, must first be accepted by public authority. Technically, prescription presupposes a grant. There can not, in fact, be a grant without some person in *esse* to take as the grantee. Therefore generally, when the term "prescriptive right" is used by the courts, it refers to the per-

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sonal right to the use of real property which has been acquired by the claimant, or some one under whom he holds, and which has been created by operation of law. If in fact there was a grant by the owner of the fee, the grantee, and his heirs and assigns, if it were a perpetual grant, or one for a term of years, would hold according to its terms. However, from a continuous user under claim of right for such a length of time, formerly where the memory of man ran not to the contrary, but later for such time as was equivalent to the statutory period of limitation applicable to real estate, the fiction was adopted that the existence and loss of a grant would be presumed by law. It came first to be applied to claims of individual or private rights. It was deemed that a grant "to the public" would be void for want of its competency to take by grant. Jones on Easements, section 422; Washburne's Easements and Servitudes, p. 219. Appellant therefore questions certain opinions of this court where it has spoken of the public's having obtained the right to use a passway by prescription. If the terms employed were to be limited to their ancient use and meaning, the criticism would not be inapt. But they have long since come to be used in describing the right of the public in such passways, and how created; not alone by this court, but by other courts and text-writers. Appellant's very earnest argument that a right can not be created in the public by prescription rests upon the narrowest employment of that term, and is extremely technical. But we understand him to contend as well that long user by the public of a passway can not create the right to continue the use, by whatever name it may be called. A highway is commonly understood to be a turnpike road, gravel road, or plank road, or the common thoroughfare established and maintained by public authority for travel by the public generally. Its establishment is by the ded-

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ication of the land to the use of the public as a highway and its acceptance and use by the public for that purpose. Ordinarily, the dedication is by statutory proceedings, showing both the dedication and the acceptance. But it is not essential that the evidence of either should be established by the records. If the owner of the fee sets apart to the use of the public a passway over his land, intending to dedicate it to the public use, it is not required to be in writing. A dedication of land to public use may be by parol. Trustees of Dover v. Fox, 9 B. Mon., 201; McKinney v. Griggs, 5 Bush, 405, 96 Am. Dec., 360; Griffey v. Bryars, 7 Bush, 473; Hall v. McLeod, 2 Metc., 104, 74 Am. Dec., 400; Beall v. Clore, 6 Bush, 677; Spurrier v. Bland (20 R., 1340), 49 S. W., 467; Wickliffe v. City of Lexington, 11 B. Mon., 155. It is sufficient if his intention and express act are clear and coincide. In that event the dedication will be effective immediately upon its acceptance by the public. Elliott on Roads and Streets, 127. If, however, there is not an express dedication, but the owner suffers the public to use the passway, knowing it is claiming it as a matter of right, the law presumes a dedication to the public, and presumes the dedicator's intention to be in accord with the public's use. This does not depend upon whether there has in fact been an actual dedication to the public, but it is founded upon the principals of estoppel *in pais*. If the real owner suffer the public generally to so use his land as a passway, under a notorious claim of right, for a great length of time, whereby others may have been induced to buy property in that vicinity relying upon the apparent right of the public to use this passway, and by which the purchase price of their lands may have been affected, it is unfair that the owner should be permitted to gainsay the truth of it. The law operates upon his conscience, and makes effectual that which he has suffered for so

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long to appear to be so, by raising the conclusive presumption that he has actually done what he allowed the public to believe he had done—dedicated the passway to the use of the public. Elliott on Roads and Streets, 132; Jones on Easements, 422. A dedication by the owner to the public use is not alone sufficient. A dedication sometimes imposes burdens upon the public as well as grants privileges. It would not do to allow one of his own volition merely to thus impose an onerous burden upon an unwilling public. It is therefore necessary that there should be an acceptance by the public as well as a dedication by the owner. As already indicated, this acceptance may be signified by the action of those officials whose duty it is to represent the public in those matters. A formal order upon the records of the proper official body would, of course, be the most satisfactory manner of acceptance. But much less may be equally effective. As, for example, it has been held, the appointment of overseers, the allotment of hands, or the maintenance of the highway at the public expense are sufficient evidence of the acceptance. Commonwealth v. Abney, 4 T. B. Mon., 479; Gedge v. Commonwealth, 9 Bush, 64; Greenup Co. v. Maysville & B. S. R. R. Co. (14 R., 699), 21 S. W., 351; L., H. & St. L. R. R. C. v. Commonwealth, 104 Ky., 35, 20 R., 371, 46 S. W., 207. The cases from this court cited just above all raised the question of acceptance of public roads by implied dedications by long user, where it was shown that the county officials had by some overt act, and generally of record, recognized and adopted the dedicated highway as a public road. In none of these cases does it seem that the question has been raised whether a sufficient acceptance on behalf of the public might have been by any other method than those just mentioned. A number of officially unreported cases decided by this court have assumed that it

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could. Gatewood v. Cooper, 18 R., 869, 38 S. W., 690; May v. Blackburn, 15 R., 705, 25 S. W., 112; Burch v. Blair, 19 R., 641, 41 S. W., 547; Potts v. Clark, 23 R., 332, 62 S. W., 884; Wright v. Willis, 23 R., 565, 63 S. W., 991; the Eastern Cemetery Co. v. City of Louisville, 13 R., 279, 15 S. W., 1117.

These cases are criticised by counsel for appellant, and claimed to have been not well considered, and in conflict with those reported cases holding an acceptance by the public authority to be essential to the complete dedication of a public road. That an acceptance of a public highway—as distinguished by some eminent authorities from a mere public passway—may be by acts less than the recognition of the dedication by an order of record, or by the appointment of overseers, or the allotment of hands by the county court, or the expenditure of public funds to keep them in repair, there is abundant authority. Of this Jones on Easements (section 449) says: "Such acceptance, however, need not be formal, but may be shown by circumstances, such as long-continued use by the public, by improvements or repairs of the way, by grading, macadamizing, building, or the like, or by the taking charge of the road by the proper public officials. Where there has been a dedication of the highway, and this appears to be beneficial to the public, acceptance will be presumed from slight circumstances." Same, section 450: "In some cases an acceptance by the public of land dedicated to use as a highway has been established by use alone, without any action on the part of the municipal officers." The Supreme Court of Wisconsin, in Buchanan v. Curtis, 25 Wis., 99, 3 Am. Rep., 23, held that an acceptance of a highway dedicated by implication would be presumed from the travel upon it by the public for such a time and to such an extent as to show that the public convenience and accommodation require the road. The rule is the same in Missouri. In Bauman v.

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Boeckeler, 119 Mo., 189, 24 S. W., 207, the Supreme Court said that there must be an acceptance of the dedication by the public "either by user for a length of time more or less according to circumstances, or by its adoption by the public authorities." Brinck v. Collier, 56 Mo., 164; Kansas City Milling Co. v. Riley, 133 Mo., 574, 34 S. W., 835. In Washburne's Easements and Servitudes, 219, it is declared upon authority that: "Length of enjoyment may be regarded when the evidence of a dedication having been made depends on user by the public of the thing dedicated. But, as all that is requisite to constitute a good dedication is that there should be an intention and an act of dedication on the part of the owner and an acceptance on the part of the public, as soon as these concur, the dedication is complete. Ordinarily, there is no other mode showing an acceptance by the public of a dedication than by its being made use of by them, and this must be sufficiently long to evince such acceptance." Judge Elliott, in his work on Roads and Streets (page 117) says: "There has been much diversity of opinion as to whether user by the public will amount to an implied acceptance, and cast the burden of maintenance upon the local government. . . . This uncertainty is removed by the later authorities, and it may now be considered as the prevailing opinion that an acceptance may be implied from a general and long-continued use by the public as of right." In Manderschid v. City of Dubuque, 29 Iowa, 73, 4 Am. Rep., 196, the Supreme Court of Iowa, in applying the same doctrine, said: "It is probably the settled doctrine in England that no formal acceptance, other than public use, is necessary in order to make the dedication of a highway effectual. See Angell on Highways, section 158. While this rule is not uniformly recognized in this country, yet it is believed that the weight and prevailing current of authorities support it." (Quite an ar-

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ray of cases, cited in support of the statement.) The rule in Connecticut is that the convenience to the public of a highway in question, coupled with use by the public, when dedication is sufficiently shown, will support a presumption of acceptance. Green v. Canaan, 29 Conn., 157; Guthrie v. New Haven, 31 Conn., 308. A number of other cases examined, and which support the general doctrine of an acceptance by the public being presumed from its long-continued use of the highway, are appended. Cook v. Harris, 61 N. Y., 448; People v. Loehfelm, 102 N. Y., 1, 5 N. E., 783; Ross v. Thompson, 78 Ind., 90; Steele v. Sullivan, 70 Ala., 589; Eureka v. Croghan (Cal.) 19 Pac., 485; Carter v. City of Portland, 4 Ore., 339; Commonwealth v. Moorehead, 118 Pa., 344; 12 Atl., 424, 4 Am. St. Rep., 599; Warren v. Jacksonville, 15 Ill., 236, 58 Am. Dec., 610; Grube v. Nichols, 36 Ill., 92; State v. Fisher, 117 N. C., 733, 23 S. E., 158; Buchanan v. Curtis, 25 Wis., 99, 3 Am. Rep., 23; Attorney General v. Abbott, 194 Mass., 323, 28 N. E., 346, 13 L. R. A., 251; Smith v. Flora, 64 Ill., 93; Los Angeles Cemetery Co. v. Los Angeles (Cal.) 32 Pac., 240; Harrison Co. v. Seal, 66 Miss., 129, 5 South., 622, 3 L. R. A., 659, 14 Am. St. Rep., 545; Bauman v. Boeckeler, 119 Mo., 189, 24 S. W., 207; Kansas City Milling Co. v. Riley, supra; Pomfrey v. Village of Saratoga Springs, 34 Hun., 607; Porter v. Village of Attica, 33 Hun., 605; State v. Eisele (Minn.) 33 N. W., 785. There are but few cases which we have found to the contrary, especially of modern promulgation. Among these are Commonwealth v. Kelly, 8 Grat., 632; Mayberry v. Inhabitants, etc., 56 Me., 342; Bowers v. Suffolk, etc., Co., 4 Cush., 332.

The former opinions of this court do not necessarily hold that an acceptance by long-continued use alone by the public of a highway in question would not be a sufficient acceptance. In Gedge v. Commonwealth, supra, which was an indictment

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for obstructing an alleged highway, the court found as a matter of fact that the supposed highway had never been used as such by the public. What the court decided was that an acceptance "either express or by implication" was necessary to constitute the way into a public street. Greenup Co. v. Maysville & B. S. R. R. Co., 14 R., 699, 21 S. W., 351, was an indictment for obstructing a public road. As to how the road might be dedicated, the court said: "It seems to be settled that a grant of a right of way and its acceptance by the proper authority and in the proper manner will be conclusively presumed from an uninterrupted and adverse use by the public as a right, and not the effect of indulgence or permission for the period of fifteen years or more." The cases of Gedge v. Commonwealth, supra, and Wilkins v. Barnes, 1 R., 328, 79 Ky., 323, were cited in the opinion. L., H. & St. L. Ry. Co. v. Commonwealth, supra, was also an indictment involving the question of the establishment of a public highway by common-law dedication. Although the court found that the county court had appointed overseers over the road and had allotted hands to work it, the court took occasion to say: "A continued, uninterrupted, and adverse use of a highway as such by the public, as a right, for the period of fifteen years, creates a conclusive presumption of dedication and acceptance of it."

But it is urged that the case of Wilkins v. Barnes, supra, is in conflict with the doctrine being discussed; that it expressly decides that an acceptance by the public officials by some overt official act indicating a purpose to accept the road is necessary. Gedge v. Commonwealth and Commonwealth v. Kelly, supra, are mainly relied on as authorities. Whatever may have been the extent of the court's views in that opinion, it is clear that beginning with Eastern Cemetery Co. v. City of Louisville, supra, and Greenup Co. v. Mays-

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ville & B. S. R. R. Co., supra (decided in 1891 and 1893), it has never since been applied with the same strictness. It is not in accord either with the weight or current of the authorities. Nor do we believe it is, in its extremity, sound in principle. As all highways are established for the public, to meet their demands and necessities in traveling, it ought to be that they should be permitted to accept a dedication of a roadway given to them by grant, if they deem it to their interest to do so. The statutory method of opening new roads is better suited, if not intended, for cases where there may be objection to the proceeding on the part of the landowner, or where his grant is involuntary, and a condemnation must be resorted to. On the other hand, if the owner sees proper to voluntarily grant or dedicate a right of way to the public, and if it is necessary to the public travel, and accepted and used for that purpose, we can not see that it should be either denied or discouraged. The fact that such a road is persistently and generally used by the public for a great number of years proves its necessity. That the public officials—in this State the fiscal and county courts—should have it in their exclusive power to deny the public the right to accept the road by merely neglecting to provide for its maintenance by having hands allotted to keep it up, the hands being generally those members of the public most interested in it, or by refusing or failing to note their approval by an order on their records, is not reasonable. As a matter of fact, the road may not need work or repair. Why should the county officials be compelled to do a vain thing, then, in allotting hands for the purpose?

We feel constrained by reason and authority to hold that, while an acceptance by the public is essential to a complete dedication of a public highway or passway, the acceptance may be either by formal ratification by the proper official

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board of the municipality; or by implication by it, where it takes charge of the road by directing improvements on behalf of the public, or otherwise by overt act recognizing it as a public road; or it may be by the public by such protracted and continued use as to clearly indicate its acceptance, when the road dedicated is a benefit to the public and not a burden. In the last-named state of case, a formal acceptance by the proper legal authority will be conclusively presumed to have taken place. Should the road become a burden to the public, it may be discontinued in the method pointed out by the statutes.

It is claimed in argument that the road passes through "woodland," and that therefore the public does not acquire a right by its use for whatever length of time it may have been continued. While it is true that a part of the road is shown to pass through a woodland, it is not shown that this woodland is not inclosed. From all the evidence it seems probable that it is. Ordinarily, the use by the public of a passway through uninclosed woodland is deemed to be by permission of the owner, and not to be adverse to his title. Wilkins v. Barnes, supra. But this may or may not be so, according to circumstances. May v. Blackburn, supra. There is no apparent reason for extending the exception as to uninclosed woodland to this case.

Perceiving no error in the record, the judgment of the circuit court is affirmed.

Petition for reharing by appellant overruled.

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CASE 70—ACTION BY KNOX AGAINST GOODPASTER & RICHART FOR THE VALUE OF A CROP OF TOBACCO.—NOV. 10.

Richart v Goodpaster &c.

APPEAL FROM BATH CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT RICHART APPEALS. REVERSED.

AMOUNT IN CONTROVERSY—APPEAL—JURISDICTIONAL AMOUNT—EXECUTION—STATUTES—LEVY ON JOINT PERSONALTY—FAILURE TO INVENTORY.

Held: 1. Plaintiff alleged that he was entitled to $80 of the proceeds of a crop of tobacco sold by one of defendants, but that the other defendant claimed a lien on plaintiff's portion. The first defendant admitted plaintiff to be entitled to $80, but the other defendant answered, alleging, among other things, that plaintiff's share amounted to $225. To this answer plaintiff and the former defendant demurred, and the demurrer was sustained, and judgment given for plaintiff for $80. HELD, That the demurrers having admitted the allegation of the answer, the "amount in controversy" was more than $200, and hence authorized an appeal.

2. From the moment an execution is placed in the hands of an officer for collection a lien is created for its payment on all the property of the defendant in the execution.

3. Civil Code, section 660, relative to execution levies on joint property, provides that where an officer levies execution on property held by the execution debtor jointly with another person he shall not deprive such person, without his consent, of the possession of the property, except for the purpose of having it inventoried and appraised, which he shall cause to be done, etc. HELD, That where an execution against one having a joint interest in a crop of tobacco was placed in the hands of a constable, who made a levy and indorsed the same on the execution, the fact that he failed to appraise and inventory the property did not prevent the existence of an execution lien, the purpose of section 660 being to protect the rights of joint owners.

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REUBEN GUDGELL & SON, ATTORNEYS FOR APPELLANT.

SYNOPSIS OF QUESTIONS RAISED BY THIS BRIEF AND AUTHORITY CITED.

1. All of the facts alleged by the appellant's answer and amended answer are to be considered as admitted by the appellees' demurrer.

2. That the reception of and levy of the execution by the constable was valid and created a lien in favor of the appellant upon Knox's one-half of the tobacco. Civ. Code, sec. 660; Ky. Stats., sec. 1660.

3. That the appellees were estopped by their acts from denying the levy of the execution and creation of the lien. Foster v. Shreene, 6 Bush, 529-530.

4. That the appellee Goodpaster was the bailee of the constable and could not set up a want of title as a justification of his refusal to deliver the property. That his unauthorized sale of the property was a conversion of the property. Am. & Eng. Ency., vol. 3, 2d ed., pp. 758-759, 773-734.

5. The appellant being the party in interest representing the bailor could ratify the sale and demand the proceeds of the sale and maintain his action of assumpsit therefor. Am. & Eng. Ency., vol. 3, 2d ed., p. 734.

C. W. GOODPASTER, ATTORNEY FOR APPELLEE KNOX.

The constable who had and levied the execution of appellant Richart on the interest of Knox in the tobacco owned jointly by Knox and Goodpaster, failed to inventory and appraise the tobacco pursuant to section 646, Civil Code, and failed to return such inventory and appraisement with the execution to the office from which it issued. The answer of the appellant failing to show that the constable performed his duty as required by the code, the demurrer thereto was properly sustained.

The amended answer alleging that Goodpaster told the constable that he would hold Knox's tobacco and that Knox requested the constable not to sell it until he, Knox, commenced housekeeping and could claim the tobacco as exempt, and that Knox was thereby estopped to deny that a lien had been created by the attempted levy of the constable on Knox's interest in the tobacco, did not cure the original answer, and the demurrer was properly sustained to it also, and we submit that under the pleadings no lien is shown to have been created by the attempted levy on the interest of Knox in said tobacco. Civil Code, secs. 660, 646; Bedford v. Kesler, 15 R., 31; Victory v. Strausbaugh, 78 Ky., 426; Dils v. Hatcher, 24 R., 827.

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OPINION OF THE COURT BY JUDGE NUNN—REVERSING.

The facts in this case, as appear in this record, are in substance as follows: Appellee Knox was a tenant of appellee Goodpaster in the year 1901, and as such he raised a crop of tobacco on the shares, which was housed in Goodpaster's barn. Appellant, Richart, caused two executions to be issued upon judgments which he held against appellee Knox, and placed them in the hands of the constable of Bath county, and which were by him levied upon the interest of Knox in this tobacco. The constable left the tobacco in the care of appellee Goodpaster, but failed to have it appraised and inventoried as required by section 660 of the Civil Code, but indorsed the levy of the executions, and returned them to the office from which they issued. Soon after this, Goodpaster sold the entire crop of tobacco, which had not been divided, and held that part of the proceeds belonging to appellee Knox, which he claimed was $80, and refused to pay it to either Knox or appellant until the matter was settled as to which was entitled to it, both claiming the funds. On the 30th day of July, 1902, the appellee Knox filed his petition in the Bath Circuit Court against Goodpaster and the appellant, Richart, in which he stated that he was entitled to two-fifths of the proceeds of this tobacco, which he claimed amounted to $80, and also alleged that appellant, Richart, claimed to have some claim or lien on this tobacco, and asked that he be required to present same. Goodpaster answered, admitting the allegations of the petition to be true, and stating that he was ready to pay the $80 to the party whom the court might adjudge was entitled thereto. The appellant filed an answer and amended answer alleging that this judgment claim against appellee Knox amounted to $250, and was wholly unpaid, and denied that appellee Knox's interest amounted to only $80, and was two-fifths,

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but alleged that it amounted to $225, and was one-half interest in the crop, and also alleging that he had a lien upon Knox's interest therein by reason of the levy of these executions thereon, and he made his answer a cross-action against Goodpaster, and asked for a judgment over against him for the sum of $225. The court sustained a demurrer to appellant's answer and amended answer, dismissing his answer and cross-petition, and adjudging that appellee Knox was entitled to the $80 in the hands of Goodpaster, from which judgment appellant has appealed.

The appellees moved to dismiss the appeal for the reason, as they claim, that the amount in controversy is less than $200, the judgment being for only $80. We can not concur with appellees in this contention. By their demurrer they admitted the allegations of appellant's answers, and his claim as stated amounts to $250, and the amount sought to be recovered in this action was the value of Knox's half interest in this crop of tobacco, which was alleged to be $225, and the court adjudged against him on this claim, and it is this judgment that appellant is seeking to have revised, and which makes the amount in controversy on this appeal more than $200.

The only other question to be determined is whether the action of the constable in making the levy and the manner in which he performed it created a lien in favor of the execution creditor. The appellees contend that because he failed to have the property appraised and inventoried no lien was created. Under the laws of this State, from the moment an execution is placed in the hands of an officer for collection a lien is created for its payment upon all the property of the defendant in the execution situated in the county subject to execution. By the first part of section 660 of the Civil Code, it is clearly indicated that an officer may levy

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an execution upon personal property held by the execution debtor jointly with another person without having the property inventoried and appraised; that such is not necessary to complete the levy. The purpose of this section of the Code was to protect and preserve the rights of execution creditors, and especially joint owners of personal property other than the execution debtors, and to prevent the officer from taking possession of the property, to the possible injury and detriment of the joint owner. The lien was created upon this tobacco when the execution was placed in the hands of the constable. The levy was made and indorsed on the executions, and the lien still existed thereon, notwithstanding the failure of the constable to perform his duty as to having it appraised and inventoried.

For these reasons, the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

CASE 71—ACTION BY THE LOUISVILLE CITY NAT. BANK AGAINST MARY C. WOOLDRIDGE AND OTHERS FOR A BILL OF DISCOVERY AS TO CERTAIN PROPERTY OWNED BY CHARLES F. JOHNSON.—NOV. 10.

Louisville City Nat. Bank v. Wooldridge, &c.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

JUDGMENT FOR DEFENDANTS AND PLAINTIFF APPEALS, AND THE APPELLEE, MARY C. WOOLDRIDGE, FILES CROSS-APPEAL AGAINST LOUISVILLE CITY NAT. BANK AND THE ADMINISTRATOR OF MARY LAWRENCE JOHNSON, DECEASED. AFFIRMED ON ORIGINAL AND ON CROSS-APPEAL.

HUSBAND AND WIFE—MARRIED WOMAN'S WILL—RIGHT TO BEQUEATH PERSONALTY—HUSBAND'S CONSENT—FRAUD ON CREDITORS—REMAINDERS.

Held: 1. General Statutes, article 4, chapter 52, section 15, provides that corporate stock transferred to a *feme sole*, and expressed on the transfer book to be for her use, could be disposed

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of by will with the consent of her husband, or without his consent if so expressed in the deed or will creating the trust. Kentucky Statutes, 1899, section 2147, converts all personalty of married women into separate estate, and confers power of deposition by will, subject to the provisions of the act. HELD, That a married woman can dispose of her personal estate by will, with the consent of her husband; the right having existed at common law, and not having been abridged by statute.

2. Kentucky Statutes, 1899, section 1906, provides that every gift, conveyance, etc., of any estate, with intent to delay, hinder and defraud, shall be void as against creditors. HELD, That the statute refers to property owned by the debtor, and it is no fraud as to his creditors for a husband to consent to a wife's testamentary disposition of her personalty.

3. Where a will gives testatrix's daughter a bequest, with a provision that if the daughter die before testatrix or the daughter's husband the legacy shall vest in the husband, the bequest in remainder takes effect only in the event of the death of the first taker before testatrix.

KOHN, BAIRD & SPINDLE AND C. H. SHEILD, ATTORNEYS FOR APPELLANT.

POINTS AND AUTHORITIES ON ORIGINAL APPEAL

1. The statute in force when Mrs. Johnson acquired this property, and when Colonel Johnson's marital rights therein attached, was General Statutes, chapter 113, sections 2 and 4, and under this statute Mrs. Johnson had no power to dispose of this property by will. Gen. Stats., chap. 113, secs. 2 and 4; Hickman v. Brown, 88 Ky., p. 377.

2. The Act of 1894, "Married Woman's Act," is not retrospective in its operation, and gave no power to Mrs. Johnson to destroy the marital rights of her husband in her property vested in him four years before the passage of this act. Mitchell v. Violett, 20 Ky. Law Rep., 378; Rose v. Rose, 20 Ky. Law Rep., 417.

3. If it be conceded that the Act of 1894 is retrospective in its effect, it does not confer upon Mrs. Johnson power to defeat her husband's marital rights by disposing of the property in controversy by will. Ky. Stat., chap. 66, art. 3; Smoot v. Heyser's Exor., &c., 23 Ky Law Rep., 2401.

4. The question as to whether or not Mrs. Johnson's will effectually disposes of the property in controversy, is one of power. If the statute did not give her power to make such disposition, Colonel Johnson could not supply by consent thereto

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or otherwise this lack of power. Stewart on Husband and Wife, sec. 348; Hickman v. Brown, 88 Ky., 377.

5. Mrs. Johnson was not entitled to the property in controversy as an equitable settlement. Elliott v. Waring, 5 Mon., 343.

6. Colonel Johnson did not induce his wife to make this will. He practiced no fraud on her. If any fraud was practiced by the execution of this will, it was on the bank, and Mrs. Johnson was a party to it. Colonel Johnson is not, therefore, estopped to deny the validity of the will, nor is his creditor, the bank. Lewen on Trusts, p. 62; Stewart on Husband and Wife, sec. 348.

7. Of the property in controversy, $20,000 thereof is property in which Mrs. Johnson had a life estate, the remainder interest being vested in Col. Charles F. Johnson, her husband. Jarman on Wills, vol. 3, p. 705; Howard v. Howard, 4 Bush, 497; Jacob v. Jacob, 4 Bush, 413; Darnaby v. Darnaby, 14 Bush, 489.

8. Colonel Charles F. Johnson and Powhatan Wooldridge, the only witnesses who have testified in this case, are neither of them competent witnesses as to the principal matters about which they have testified. Bright's Exors. v. Swinebroad, 21 Ky. Law Rep., 369; Flood v. Pragoff, 79 Ky., 616; Civil Code, sec. 606; Hopkins' Admr. v. Faever, 86 Ky., 226; Hornsby v. Davidson, 21 Ky. Law Rep., 232; Commonwealth v. Sapp, 90 Ky., 585; Edelmuth v. Wybrant, 21 Ky. Law Rep., 930.

9. Section 15 of chapter 52 of the General Statutes is not applicable to the property in question, and Mrs. Johnson's heirs at law are not entitled to said property by virtue of that statute. Gen. Stats., chap. 52, sec. 15. The cases cited by counsel for the appellees are not in point. Kent's Admr. v. The Deposit Bank, 91 Ky., 79; Bank of Louisville v. Gray, 84 Ky., 565.

POINTS AND AUTHORITIES FOR APPELLANTS ON CROSS-APPEAL OF MARY C. WOOLDRIDGE.

1. The court properly overruled the exceptions of Mary C. Wooldridge to the commissioner's report, thereby rejecting her claim against the estate of decedent, Mary L. Johnson, for $58,674.25. Taylor on Evidence, sec. 567; authorities cited, clause 8, *supra*.

2. The court properly overruled the demurrer of Mary C. Wooldridge to the amended answer of the Louisville City National Bank, by which it pleaded the five years' statute of limitations as a bar to her claim. Ky. Stats., sec. 2515; Coffey v. Wilkerson, 1 Met., 103; Wood on Limitations, vol. 1, sec. 183; Roberts v. Roberts, 7 Bush, 103; Wood on Limitations, secs. 6, 13 to 16; Wood on Limitations, vol. 2, sec. 200, p. 504; Martin v. Leatt.

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18 B. M., 573; Finley v. Patterson, 2 B. M., 76; Riggs v. Dooley, 7 B. M., 236; Boyce's Heirs v. Dudley, 8 B. M., 511; Clark v. Jones, 16 B. M., 121; Mitchell v. Berry, 1 Met., 602; Hull v. Deatty, 7 Bush, 687; Kendall v. Slaughter, 1 A. K. M., 375.

3. The court properly overruled the motion of Mary C. Wooldridge to strike from the file the answer and the exceptions of the Louisville City National Bank.

E. L. McDONALD AND HUMPHREY, BURNETT & HUMPHREY, ATTORNEYS FOR MARY C. WOOLDRIDGE.

POINTS AND AUTHORITIES. ON APPEAL OF LOUISVILLE CITY NATIONAL BANK.

1. A surviving husband is a competent witness as to facts that came to his knowledge from statements of his wife, since deceased, which were not made by reason of the confidential relation existing between husband and wife. Sec. 606 of Code; Wise v. Foote, 81 Ky., 13; sec. 1 of Act of 1898; McGuire v. Maloney, 1 B. Mon., 225; Short v. Tinsley, 1 Met., 401; Sharpe v. Proctor, 1 Bush, 399; English v. Cropper, 8 Bush, 293; Booth's Exor. v. Vanarsdale, 9 Bush, 719; Storms v. Storms, 3 Bush, 79; Jones on Evidence, sec. 202; Greenleaf on Evidence, sec. 81.

2. Under the law as it existed prior to the Act of 1894, known as the Husband and Wife Act, a married woman had the power to make a will of her personal estate, with the consent of her husband, given at the time the will was made at the time of its probate. George v. Bussing, 15 B. Mon., 558; Hiram v. Griffiths, 8 Bush, 262; White v. Sale, 7 Ky. Law Rep., 570; Jarman on Wills, 30; General Statutes, chap. 52, sec. 15.

3. A married woman having stocks in Kentucky corporations, the certificates of which are in her own name and held by her as her separate estate, had power, prior to 1894, to dispose of same by will, with the consent of her husband. Gen. Stats., chap. 52, sec. 15; Kent's Admr. v. Deposit Bank of Owensboro, 91 Ky., 70; Bank of Louisville v. Gray, 84 Ky., 565.

4. Such rights as were given married women to make wills of their personal estate were not taken away by the Weissinger Act of 1894, above referred to, and since the passage of said act married women certainly have full power to dispose, by will, of their separate personal estate with the consent of their husbands. Ky. Stats., sec. 2147; Garner v. Wills, 92 Ky., 389; Gen. Stats., chap. 31, sec. 11; Kent's Admr. v. Deposit Bank, 91 Ky., 70, 78.

5. The husband has no vested rights in his wife's separate personal estate, during her lifetime, which could be affected by the

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Weissinger Act, enlarging her powers of disposing of the same by will. Mitchell v. Violett, 20 Ky. Law Rep., 378; Rose v. Rose, 20 Ky. Law Rep., 417; Cooley Const. Lien, 5th ed., p. 442; Am. & Eng. Ency of Law, vol. 24, p. 427.

6. A married woman possessed of separate personal estate, with full power to dispose of same in her lifetime, being induced by her husband's consent to make a disposition of it by will, so as to deprive him and his creditors of any interest in it, the husband and his creditors are estopped to deny the validity of such method of disposition. Pomeroy's Eq. Juris., sec. 802; Strickland v. Aldridge, 9 Ves., 219; Lewin on Trusts, p. 62; Caldwell v. Caldwell, 7 Bush, 515.

7. A husband possessed of an estate of over $150,000, having accepted of his wife's property $10,375 upon the relinquishment of all claim, present or prospective, against her remaining estate, amounting to less than $50,000, is estopped, as are also his creditors, after his death, to claim any interest in such remaining estate as distributee or otherwise. Campbell v. Gailbreath, 12 Bush, 464; Thomas v. Harkness, 13 Bush, 23; White v. Sale, 7 Ky. Law Rep., 570; Ward v. Crotty, 4 Met., 60; Wilborn v. Ritter, 13 Ky. Law Rep., 122; Jones v. Nisbet, 12 Ky. Law Rep., 796; Bryant's Admr. v. Bryant, 3 Bush, 155; Green v. Green, 4 Ky. Law Rep., 250; Herman on Estoppel, sec. 1124; Darnaby v. Darnaby, 14 Bush, 489 (distinguished); Bowling v. Winslow, 5 B. Mon., 31; Watson v. Robertson, 4 Bush, 39; Elliott v. Waring, 5 Mon., 341.

8. A husband's consent to the will of his wife disposing of her separate estate constitutes no fraud on his creditors, since he does not thereby release or convey any interest vested in him. Garner v. Wills, 92 Ky., 386; Skinner's Appeal, 5 Barr (Pa.), 63; 45 Pa. Stats., 528; Dennison v. Nigh, 2 Watts (Pa.), 90; White v. Waite, 47 Vt., 502; Ky. Stats., sec. 1906; May on Fraudulent Conveyances, p. 17; Crozier v. Young, 3 Mon., 158; Jones v. Nisbet, 12 Ky. Law Rep., 796; Hendrick v. Peters, 10 Ky. Law Rep., 818; Bryant's Admr. v. Bryant, 3 Bush, 156; Bowling v. Winslow, 5 B. Mon., 29; White v. Sale, 7 Ky. Law Rep., 570.

9. A clear absolute bequest of personalty with full power of disposition is not defeated by a subsequent provision in the will, that upon the death of the legatee her husband shall be entitled to the bequest. Such language, if given any effect, refers to the death of the legatee, prior to that of the testatrix. Jarman on Wills, vol. 1, pp. 398-399 (2d Am. ed.); Wills v. Wills, 85 Ky., 538; Carpenter v. Hazelrigg, 103 Ky., 538; McCullough v. Anderson, 90 Ky., 126; Ball v. Hancock, 82 Ky., 107; Caleb v. Field,

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9 Dana, 346; Biddle's Estate, 28 Pa. Stat., 59; Am. & Eng. Ency. of Law, vol. 29, p. 502.

ON APPEAL OF MARY C. WOOLDRIDGE.

1. The estate of a life tenant who has received and converted the proceeds of real estate devised in trust, is liable to the remaindermen for the value of the estate so converted. Pomeroy's Eq. Juris., secs. 688, 1048; Perry on Trusts, sec. 828; Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec., 141; Edwards v. Taylor, 2 A. K. Mar., 148; Morrison v. Page, 9 Dana, 428; Cox v. Osbourne, 1 A. K. Mar., 311; Graham v. King, 96 Ky., 339; Bertram v. Ross, 23 Ky. Law Rep., 1927; Am. & Eng. Ency. of Law, vol. 27, p. 261; Pomeroy's Eq. Juris., 1058, 1080; Stephens v. Stephens, 89 Ky., 185; Woodring v. White, 12 Ky. Law Rep., 505.

2. The Statute of Limitations is not applicable in bar of the claim of such remaindermen for the value of the trust property against the estate of the life tenant until after the termination of such life estate. Lewin on Trusts, pp. 897, 900; Mays' Heirs v. Hill, 5 Littell, 309; Roberts v. Roberts, 7 Bush, 100; Lex. Life, &c., Ins. Co. v. Page, 17 Bush, 412, 446; Moore's Heirs v. Shepherd, 2 Duvall, 125; Ogden v. Walker's Heirs, 6 Dana, 422; Angell on Limitations, 474.

3. The life tenant can not hold adversely to the remainderman. Turman v. White, 14 B. M., 560; Simrall v. Graham, 1 Dana, 575; Kellar v. Stanley, 86 Ky., 240; Butler v. Carter, 5 L. R. Eq., 276.

4. A creditor of one alleged to be a distributee of the estate of a decedent, but who in fact has no interest in such estate, has no right or standing to interfere in a litigation between a creditor of the estate and the administrator, by filing an answer pleading limitations, excepting to depositions or otherwise. Code Prac., secs. 428, 429; McIntire v. McIntire, 82 Ky., 502; Hewitt, Auditor, v. Craig, 86 Ky.. 23; Postal Telegraph Cable Co. v. Snowden, 68 Md., 118; Barbour v. Whitlock, 4 T. B. Mon., 180; Code, sec. 96, subsec. 3; 5 Ency. of Pl. & Pr., 640; May v. Armstrong, 3 J. J. ar., 260; Wells v. Boyd, 1 Dur., 366; Crabtree v. Banks, 1 Met., 482; Royse v. Reynolds, 10 Bush, 296.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—AFFIRMING.

On the 29th of March, 1898, the Louisville City National Bank brought a suit in equity against Charles F. Johnson, in which they allege that they had previously recovered a judgment against him for $11,979.10, with interest from the

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13th of November, 1897, on which execution had issued directed to the sheriff, and which had been returned by him indorsed, "No property found out of which to make this *fi. fa.*, or any part thereof." The petition alleged that the defendant had in his possession, and in the possession of other persons whose names were unknown to the plaintiff, money and property which was liable for their debt, and asked that he be required to appear before the court for examination as to the whereabouts of his property, and that same be subjected to their demand. They at the same time sued out a general attachment against the property of the defendant. On the 3d day of June, 1898, and while the suit of the bank against Charles F. Johnson was still pending, the wife of the defendant, Mary Lawrence Johnson, died, leaving her husband and Mary C. Wooldridge, her only child and heir at law, the wife of Powhatan Wooldridge. The will of Mary Lawrence Johnson was duly probated in the Jefferson County Court on the 8th of June, 1898, with the consent of her husband, Charles F. Johnson, and is as follows:

"I, Mary Lawrence Johnson, do make this my last will and testament, revoking all others.

"In view of the fact that my daughter, Mary C. Wooldridge, will inherit a large estate left me by my father and mother, I bequeath to her the small sum of five hundred dollars. I make this explanation in the beginning, that my will may not be considered unjust and peculiar. I leave my daughter, Mary C. Wooldridge my carriage and horses, and the entire contents of my house during her life, at her death to be divided equally between my grandchildren. To each one of my four grandchildren, Powhatan Johnson Wooldridge, Annie Mary Wooldridge, Mary Tyler Wooldridge and Charles F. Wooldridge, I give and bequeath thirty shares of stock in the Columbia Finance and Trust Co. At the death of any one of

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the four (being unmarried) his or her shares to go to the surviving brothers and sisters. The remainder of everything that I possess, I leave as a sacred trust to my daughter Mary C. Wooldridge, knowing that she will faithfully carry out my wishes regarding it. I desire that no inventory shall be taken of my effects. Mary Lawrence Johnson.

"Witness: C. B. Seymour, Geo. D. Todd.

"I appoint my daughter Mary C. Wooldridge my executor without bond. Mary Lawrence Johnson."

Indorsed below the signature of Mrs. Johnson were these words:

"I consent to all my wife has written in her will. Charles F. Johnson."

Simultaneously with the execution of this will, Mrs. Johnson executed in writing a paper defining the sacred trust referred to in the will, which reads as follows:

"I want Chamie [Mrs. Mary C. Wooldridge] to keep two pews in Christ church as long as her father shall live just as I have done, and I want one of them kept in his name. I want her to give $100.00 to the Home of the Innocents in her father's name as long as he lives. I want her to use for her father's personal support such a part of the income from what I leave as in her judgment shall seem fit, but she shall be the sole judge as to how much or how little or whether any shall be applied in this way. I want her to care for my old servant, Ammie Wright, when she shall become unfit for work, either from age or infirmities. The balance of the income I want her to use for the education of my four grandchildren. At the death of her father, I want the principal put in trust for my four grandchildren. Chamie may sell and re-invest any part of my estate as she may see fit."

Mrs. Johnson at her death owned and was in possession of, besides her household furniture and belongings, stocks in vari-

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ous corporations, worth in the aggregate about $35,000 or $40,000. Mary C. Wooldridge declined to qualify as executrix of her mother's will, and her husband, Powhatan Wooldridge, was appointed administrator with the will annexed, and on the 17th of November, 1898, brought suit in the Jefferson Circuit Court against her heirs and creditors for the purpose of settling his accounts, and distributing the estate in accordance with the will of testatrix. Powhatan Wooldridge, after the institution, resigned as administrator with the will annexed, and J. W. E. Bailey was appointed in his place. Subsequently the defendants Mary C. and Powhatan Wooldridge filed an answer and counter-claim against the plaintiff Bailey as administrator *de bonis non* in which they allege that Robert Tyler, the father of Mary L. Johnson and grandfather of Mary C. Wooldridge, had died possessed of a large estate, which he disposed of by will, and that, after making certain specific devises to his wife, Mary L. Tyler, it proceeds as follows: "All the rest and residue of my estate, that is my real estate, I give and devise to my beloved wife, Mary L. Tyler, as trustee and in trust for each one of my daughters, share and share alike, and for their separate use during their lives, and after their deaths respectively then for such child or children as they may respectively leave with full power to my said wife at any time to sell any part of said real estate, and invest the proceeds in other real estate whenever she may think it best to do so; but any purchaser shall not be bound to see the money invested, and any property she may so purchase shall be held in trust as herein provided, and as to the balance of my estate, I give the same to my said daughters, share and share alike, forever." They state that prior to 1859 a partition was made of the real estate subject to the trust, situated in Jefferson county, and that there was allotted to Mary L. Tyler, as trustee for her

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daughter Mary Lawrence Johnson, six separate lots and tracts of land, and that thereafter, at the request of Mary L. Johnson, all of these pieces of real estate were sold by the trustee, Mary L. Tyler, and the proceeds thereof turned over by her to Mary L. Johnson, and were by her appropriated to her own use, with full knowledge of the provisions of the will of Robert Tyler, deceased; that Mary C. Wooldridge was an infant under twenty-one years of age, and a married woman when the property was converted—and charge that the purchase money realized from the sale of this trust real estate aggregated $58,974, which she asserts as a claim against the estate of her mother. The answer also sets up other claims, aggregating $3,500, for money advanced for the use and accommodation of Mary L. Johnson during her life.

The Louisville City National Bank filed their answer in the settlement suit, which they made a counterclaim against the administrator, and a cross-petition against the Wooldridges and Charles F. Johnson, in which they controvert the claims asserted both by Mr. and Mrs. Wooldridge, on several grounds. First, they deny the alleged conversion by Mrs. Johnson of the trust estate devised by the will of Robert Tyler; second, they plead that the claim is stale, and barred by the lapse of time and statute of limitation; third, that even if the trust estate devised to Mary L. Johnson by her father Robert Tyler, had been lost, it was through the negligence of Mary L. Tyler, the testamentary trustee, and the cause of action was against her, and not against Mrs. Johnson, who was a married woman; and that Mary L. Tyler had in her will devised a large amount of property to Mrs. Wooldridge upon the condition that she should not call in question the manner in which she had discharged the duties imposed upon her as trustee by the will of her deceased husband with reference to the trust estate; and that Mrs. Wool-

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dridge had accepted the provision made for her, and was estopped from questioning the manner in which the trust had been administered. They also allege that Charles F. Johnson was by law entitled, as tenant by the curtesy, to one-half of the surplus of his deceased wife's personal estate, and that, in addition to this interest which descended to him under the statute, he was by the tenth clause of the will of Mary L. Tyler entitled to have paid over to him from the estate of his deceased wife $20,000. The tenth clause in the will of Mary L. Tyler is as follows: "I give to each of my daughters, Mary Lawrence Johnson, Anna Eliza Bent, Alice Bacon, Fannie S. Bayley, and Roberta Tyler twenty thousand dollars for their sole and separate use and benefit to be forever free from the control, debts and marital rights of their present husband, and any either of them may ever have; and each of my said daughters shall have and is hereby given power and authority to dispose of the same by last will, or in any manner they may choose. But in the event that any one of all of my said daughters shall die before her or their present husband or husbands, the legacy given by this clause of my will to such daughter or daughters so dying shall pass to and vest absolutely in the surviving husband of such deceased daughter." They allege that Mrs. Johnson had no power, either under the statute which prevailed at the time she received the property disposed of, or at the time of her death, to make a will cutting out her husband, and charge that the will attempting to do so was the result of a fraudulent conspiracy in which she, her husband, and the Wooldridges had participated, for the purpose of defrauding the creditors of Charles F. Johnson, and ask that the interest of Charles F. Johnson in the personal estate devised by the wife be subjected to the payment of his debts. The Wooldridges replied to the answer and counterclaim, and alleged that their father, Charles F.

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Johnson, had been paid $10,300 from the fund devised in the tenth clause of the will of Mary Tyler which had been accepted by him in full discharge of any rights or claims which he might have by virtue of the devise contained in the tenth clause of the will of Mrs. Tyler. They deny the alleged fraudulent conspiracy to cheat the creditors of Charles F. Johnson in the making of the will of Mary L. Johnson, or that she was not authorized to dispose of her personal estate. The pleadings were made up by rejoinder, surrejoinder, etc.; and upon final submission the trial court sustained the will of Mrs. Johnson, and held that neither her husband, Charles F. Johnson, nor the bank, as his creditor had any interest in or claim thereon and dismissed the claim of the bank, and the bank has appealed.

The record discloses that in 1856 Charles F. Johnson married Mary L. Tyler, the daughter of Robert Tyler; that after his death, in 1852, the real estate devised by Robert Tyler was partitioned between his devisees, and that before the death of his widow executrix and testamentary trustee, in 1891, she had sold and conveyed real estate which belonged to Mary L. Johnson during her lifetime and at her death to Mrs. Wooldridge, for which she realized $58,974.25, which fund was not re-invested by the trustee as provided in the will, but was turned over to Mrs. Johnson and her husband, Charles F. Johnson, who spent it. It appears that in 1890 Mrs. Tyler gave to her daughter Mrs. Johnson $100,000, $50,000 of which was invested in real estate, and the remaining $50,000 in stocks in Mrs. Johnson's name, and which constituted the greater part of the personal estate owned by her at her death, and disposed of by her will. It is also shown that Mrs. Tyler died in 1891, leaving a large estate, which was devised to trustees for her children for life, with remainder over, exclusive of the $20,000 devised by the tenth clause

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of the will, referred to above. It is shown by the testimony of both Charles F. Johnson and Mr. Wooldridge that $10,373 devised by the tenth clause of the will of Mrs. Tyler was paid over to Johnson under an agreement with his wife that it should be accepted in full of his interest in this fund.

The record presents many interesting legal questions, all of which, however, it will not be necessary for us to discuss. The first and most important one to be decided is whether Mrs. Johnson had the power, with her husband's consent, to make a valid disposition of that part of her personal estate to which he would have been entitled if she had died intestate. The right of a married woman to dispose of personal estate by will has often been the subject of inquiry at the hands of the courts. The common law with reference to this power is thus stated by Mr. Blackstone: "Among the Romans a married woman was as capable of bequeathing as a *feme sole*. But with us a married woman is not only incapable of devising lands, being excepted out of the statute of wills (34 and 35 Henry VIII, c. 5), but also she is incapable of making a testament of chattels without the license of her husband, for all her personal chattels are absolutely his. It would therefore be extremely inconsistent to give her a power of defeating that provision of the law by bequeathing those chattels to another. Yet by her husband's license she may make a testament, and the husband upon the marriage frequently covenants with her friends to allow her that license. But such license is more properly his assent, for, unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand has given her permission to make a will. Yet it shall be sufficient to repel the husband from his joint right of administering his wife's effects, and administration shall be granted to her

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appointee, with such testamentary paper annexed." See Blackstone's Commentaries, 497 and 498.

It has been held in numerous decisions by the court in England and the United States that the husband could waive his marital rights in the personal property of the wife by consent to her will. In George v. Bussing, 54 Ky., 558, the question of the power of the wife to make a valid disposition by will of her personal estate and slaves was directly involved, and this court, in a very carefully considered opinion by Judge Simpson, said: "The doctrine is well settled that the wife may dispose of her separate estate by will, and may make a will in pursuance of a power given her for that purpose. It is also settled doctrine that she may, with the consent of her husband, make a will to dispose of her personal estate. The principle upon which the power to make a will in such a case rests is this. The husband may waive the interest in her property which the law confers upon him, and empower the wife to dispose of it by will. The grant of such a power is implied from his consent that the will should be made. A general assent that she may make a will is not sufficient. It must be proved that he has consented to the particular will which she has made, and his consent should be given when it is proved. The reason for this is that he may revoke his consent at any time during his wife's life, or after her death, before probate." It was decided that the will of the wife was valid with respect to her separate estate, and also her personal property, but that it was ineffectual to dispose of her slaves, or any personal property which belonged to the husband at the time it was executed. When this decision was rendered the Revised Statutes were in force, which gave to the husband the entire personal estate left by the wife; nor could a married woman dispose, under the statute, by the will, of any estate not secured to her separate use by deed

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or devise, or pursuant to a written power. The whole question turned upon the application of the common law to the facts of that case. So far as we are advised, the rule there announced has never been curtailed by statute or decision, and has been distinctly recognized in other cases in this State, and in numerous decisions of courts of other States. See Hiram v. Griffin, 71 Ky., 262; White v. Sale, 7 Ky. Law Rep., 570. The tendency of legislation on the subject has been in the opposite direction. Both by the Revised and General Statutes, a married woman was authorized to make a will disposing of estate secured to her separate use by deed or devise, and in the exercise of a written power. Section 15, c. 52, art. 4, General Statutes, provided that "if any stock in any bank or other corporations of this State is taken for or transferred to any *feme sole* and it is expressed on the certificate or transfer book that it is for the use of such *feme sole,* no husband of her should take any interest in such stock or in the dividends thereof, and that at her death it should pass to her heirs; and that she could dispose of it by will with the consent of her husband or without his consent if provided in the deed or will creating the trust." The act of 1894 (Acts 1894, p. 176, c. 76) still farther extends the power of married women, and converts all their personal property into separate estate, and confers upon her the power to dispose of her estate by last will and testament, subject to the provisions of the act. See Kentucky Statutes, 1899, section 2147.

We do not refer to these successive provisions of the statute for the purpose of resting thereon our conclusions that Mrs. Johnson had the power to dispose of her personal estate by will with the consent of her husband, because, in our opinion, the right existed at common law, but to show that it was

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in no way changed or abridged by these various statutory provisions. During the life of Mrs. Johnson, her husband had no vested interest in the personal property disposed of by her. He could not have reduced it to possession without her consent, and she could have sold it, given it away, or disposed of it in any way she saw fit without his consent. It is therefore hard for us to understand how he perpetrated a fraud upon his creditors when he consented that she should do by last will and testament what she had the undoubted right to do during her life. Section 1906, Kentucky Statutes, 1899, provides that "every gift, conveyance," etc., "of any estate with intent to delay, hinder and defraud shall be void as against such creditors." This statute refers to property owned by the debtor, and which his creditors had the right to subject. See Crozier v. Young, 19 Ky., 158. In Hickman v. Brown, 88 Ky., 377, 10 R., 952, 11 S. W., 199, the husband did not consent to the execution of the will, but contested its probate, and it came to this court on a verdict rejecting the will. There is no reference in the opinion in that case to George v. Bussing, Hiram v. Griffin, or White v. Sale, and no intimation that the court intended to depart from the well-established common-law doctrine, and it must therefore be considered as simply deciding the question which the court had before it. In Smoot v. Heyser's Executor, 113 Ky., 81, 23 R., 2401, 67 S. W., 21, there was no question of consent by the husband to the wife making a will involved; and the court in that case decided that under the act of 1894 the wife could not dispose of her property by will, without the consent of the husband, so as to deprive him of the interest in her property secured to him by the statute. We, therefore, conclude that Mrs. Johnson had the power, with the consent of her husband, properly evidenced, to dispose of her separate

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personal estate by last will and testament, and that such consent was no fraud upon his creditors.

The contention of the appellant that Charles F. Johnson had a remainder interest in the devise of $20,000 made in the tenth clause of the will of Mary Tyler to her daughter Mrs. Johnson appears unsound. In this clause of her will Mrs. Tyler gives to each of her daughters, for their separate use and benefit, $20,000, free from the control, debts, and marital rights of their husbands, with power and authority to dispose of it by last will in any manner they may choose. The section then provides that in the event any one of her daughters should die before her, or their husbands, the legacy given by this clause should pass to, and vest absolutely in, the surviving husband of such deceased daughter. In somewhat similar provisions in wills devising both real and personal estate this court has uniformly held that the bequest in remainder only took effect in the event the first taker should die before the testatrix. This seems to be the only possible construction which reconciles the first and last part of the clause. The principle is well stated in 1 Jarman on Wills (2d Ed.) p. 398, where the author says: "Sometimes, where an estate in fee is followed by apparently inconsistent limitations, the whole has been reconciled by reading the latter disposition as applying exclusively to the event of the prior devisees in fee dying in the testator's lifetime; the intention being, it is considered, to provide a substituted devise in the case of lapse." On page 399, the same author says: "It is clear, however, that words and passages in a will which are irreconcilable with the general context may be rejected, whatever may be the local position which they happen to occupy, for the rule which gives effect to the posterior of several inconsistent clauses must not be so applied

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as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which have found a place therein." The same doctrine is announced in Baxter, etc., v. Isaacs, etc., 24 R., 1618, 71 S. W., 907; Pool v. Benning, 48 Ky., 623; Thackston v. Watson, 84 Ky., 206, 8 R., 193, 1 S. W., 398; Duncan v. Kennedy, 72 Ky., 582; Ferguson v. Thomason, 87 Ky., 519, 10 R., 562, 9 S. W., 714; Wills v. Wills, 85 Ky., 486, 9 R., 76, 3 S. W., 900; Dickison v. Ogden's Executor, 89 Ky., 162, 11 R., 385, 12 S. W., 191; Pruitt v. Holland, 92 Ky., 641, 13 R., 867, 18 S. W., 852; Bank v. Ballard's Assignee, 83 Ky., 481, 7 R., 478, 4 Am. St. Rep., 160; Aultman v. Gibson's Guardian, 23 R., 2296, 67 S. W., 57.

It will be unnecessary for us to consider the alleged agreement by which Colonel Johnson received $10,327 of this bequest at the death of Mrs. Tyler in consideration of a full release by him of any claim to the residue at the death of his wife, or the competency of the testimony by which this agreement is attempted to be established, although we have no doubt that such an agreement could have been made by the parties, and, if properly evidenced, enforced. Our conclusions upon the question which we have considered make it unnecessary to extend this opinion, as there is no issue raised by the pleadings, except with the bank, and it is not important to it whether Mrs. Wooldridge takes the estate of her deceased mother as devisee or creditor.

For reasons indicated, the judgment is affirmed on original and cross appeals.

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CASE 72—ACTION BY MELCINA STURGILL AND HUSBAND AGAINST THE C. & O. RY. CO. TO RECOVER DAMAGES FOR INJURY TO THEIR PROPERTY.—NOV. 11.

Sturgill &c., v Chesapeake & Ohio Ry. Co.

APPEAL FROM BOYLE CIRCUIT COURT.

FROM A JUDGMENT DISMISSING THE PETITION PLAINTIFFS APPEAL. REVERSED.

MARRIED WOMAN—RIGHT TO SUE—LIMITATION—STATUTES—IMPLIED REPEAL.

Held: Kentucky Statutes, 1899, section 2506, providing that if, at the time the right of any person to bring an action for the recovery of real property accrued, such person was a married woman, she may, though the period of fifteen years has expired, bring an action within three years after such disability is removed, is not repealed by section 2128, providing that a married woman may take, acquire, and hold property, make contracts, and sue and be sued, as a single woman, etc.

J. A. SCOTT AND R. S. DINKLE, ATTORNEYS FOR APPELLANTS.

The plaintiff's petition in this case having been dismissed on demurrer the only question is: "Did the Act of March 15, 1894, remove the disability of a married woman?"

The wrongs complained of were committed by the appellee in the year 1880 in the constructing of the railroad track, so as to injure plaintiff's property by the jarring and shaking of the house, throwing soot and cinders therein, and obstructing ingress and egress to and from it.

The action was brought April 5, 1901. The property belongs to the plaintiff, Melcina Sturgill, who has been continuously the wife of her co-plaintiff ever since the cause of action accrued.

Our contention is that the Act of March 15, 1894, did not remove the disability of a married woman in respect to the time when she can bring a suit for damages to her property, and that although twenty years has passed since the cause of action first accrued, she is allowed three years after the removal of the disability in which to bring her action.

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AUTHORITIES CITED.

Ky. Stats., sec. 2128; Higgins v. Stokes, 24 R., 2427; Wood on Limitations, sec. 240, vol. 2; Onions v. C. & C. E. R. Co., 21 R., 820 (107 Ky., 154); Bankston v. C. C. M. Co., 95 Ky., 458; Odel v. Littell, 82 Ky., 146; Stephens v. McCormick, 5 Bush, 181; Bransom v. Thompson, 81 Ky., 387; Decoursey v. Deakins, 1 R., 260.

E. L. WORTHINGTON AND W. H. WADSWORTH, ATTTORNEYS FOR APPELLEE.

CLASSIFICATION OF POINTS AND AUTHORITIES.

By the Act of March 14, 1894, a married woman may sue without joining her husband and without his consent. The disability of the statute is not the coverture, but the right withheld by reason of the coverture, and when the right is no longer withheld, the disability is removed and the statute of limitations applies. Orr v. L. & N., 91 Ky., 109; Klosterman v. C. & C., &c., Bridge Co., 56 S. W. Rep., 820;, 71 S. W. Rep., 6; Ky. Stats., sec. 2506; Ky. Stats., sec. 2506, *supra;* Ky. Stats., sec. 2525; McDanell v. Landrum, 87 Ky., 404; Howard v. Gibson, 60 S. W. Rep., 491; Ency. of Law, vol. 19, p. 239, note 6; Civ. Code of Prac., sec. 34; Dietzman v. Mullin, 57 S. W. Rep., 247; So. Cov., &c., St. Ry. Co. v. Ball & Al., 59 S. W. Rep., 26; McCracken Co. v. Mercantile Trust Co., 84 Ky., 350; Clarke's Executor v. Trail's Admr., 1 Met. (Ky.), 35; Ball v. Bullard, 52 Barb., 141; Garland Co. v. Gaines, 2 S. W. Rep., 460; Safford, &c., v. Stubbs, 7 N. E. Rep., 653; King v. Merritt, 67 Mich., 217, 34 N. W., 700; Hayward v. Gunn, 82 Ill., 385; Brown v. Cousens, 51 Me., 301; Cameron v. Smith, 50 Cal., 303; Davis v. Coblens, 12 App. Cas. (D. C.), 51; Perkins v. Compton, 69 Ga., 736; Murphy v. Laundry Co., 52 Neb., 593; Nissley v. Brubaker, 192 Pa. St., 388; Castner v. Walrod, 83 Ill., 171; 25 Am. Rep., 369; Kibbe v. Ditto & Al., 93 U. S., 674; Percy v. Cockrill, 53 Feb., 872; Onions v. Covington Bridge Co., 107 Ky., 154; Lane v. Bryant, 100 Ky., 142; Gersen v. Heidrich, 104 Ill., 171; Sparks v. Roberts, 65 Ga., 571; Douglass v. Douglass, 72 Mich., 86.

OPINION OF THE COURT BY JUDGE BURNAM—REVERSING.

The appellants Melcina Sturgill and her husband, J. J. Sturgill, brought this suit on the 5th day of April, 1901. She alleges in her petition that in 1880 she was the owner and

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in possession of two houses and lots abutting on a street in Catlettsburg, and that the appellee, the Elizabethtown, Lexington & Big Sandy Railroad Company in that year constructed a railroad in the street in front of her property so as to obstruct the access to and egress therefrom, and that the running of the trains thereon caused the house to be jarred, and smoke, soot, and cinders to be thrown thereon; that these injuries were permanent in their nature, and damaged her property $2,000; that after operating the railroad for a time the Elizabethtown, Lexington & Big Sandy leased it to its co-appellee, the Chesapeake & Ohio Railway Company, who had continued its operation; and damages are sought to be recovered against both companies. The appellees, by separate paragraphs of their answer, plead the five, ten and fifteen years' statutes of limitation to the cause of action set up in the petition. To these pleas the appellants demurred. The court overruled the demurrer. Thereupon the appellants filed a reply, in which they pleaded, in avoidance of the various pleas of limitation, that at the time of the accrual of the cause of action set out in their petition Melcina Sturgill was then, and is now, and had been ever since the accrual of her cause of action, continuously a married woman, and by reason of which the statute of limitations did not run against her. Thereupon defendants interposed a general demurrer to the plaintiffs' reply, which was sustained, and, plaintiffs declining to plead further, their petition was dismissed, and they have appealed.

As the injury complained of was inflicted twenty-one years before appellants instituted their suit, it is clear that their right of action is barred, unless the fact that she was at the time of the injury, and had ever since been, a married woman prevents the running of the statute. Section 2525 of the Kentucky Statutes of 1899 provides that: "If a person en-

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titled to bring any of the actions mentioned in the third article of this chapter, except for a penalty or forfeiture, was at the time the cause of action accrued, an infant, married woman, or of unsound mind, the action may be brought within the like number of years after the removal of such disability, or death of the person, whichever happened first, that is allowed to a person having no such impediment to bring the same after the right accrued." Under this statute the various pleas of limitation relied on by the appellee were ineffectual to bar her claim, unless this statute has been expressly or by necessary implication repealed. Appellee contends, and the circuit court held, that section 2128 of the Kentucky Statutes of 1899, which is a part of the act of March 15, 1894 (Acts 1894, p. 177, c. 76), defining the property rights of the husband and wife had this effect. The statute is as follows: "A married woman may take, acquire and hold property, real and personal, by gift, devise or descent, or by purchase and she may in her own name as if she were unmarried sell and dispose of her personal property. She may make contracts and sue and be sued, as a single woman, except that she may not make any executory contract to sell or convey or mortgage her real estate, unless her husband join in such contract, but she shall have the power and right to rent out her real estate, and collect, receive and recover in her own name the rents thereof, and make contracts for the improvement thereof. A gift, transfer or assignment of personal property between husband and wife shall not be valid as to third persons, unless the same be in writing, and acknowledged and recorded as chattel mortgages are required by law to be acknowledged and recorded; but the recording of any such writing shall not make valid any such gift, transfer or assignment which is fraudulent or voidable as to creditors or purchasers."

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Whilst this statute is materially different from all former statutes relating to the property rights of husband and wife, it does not remove all of the disabilities of coverture. For instance, she can not make a contract for the sale, conveyance, or mortgage of her real estate unless her husband join in such contract. Nor can a married woman's estate be subjected to any liability upon a contract made after marriage to answer for the debt, default, or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed contract, or other conveyance. In Martha Higgins v. Clint Stokes (decided on the 12th of May, 1903) 116 Ky., 664, 25 R., 919, 74 S. W., 251, Mrs. Higsued on the 4th of January, 1902, to recover possession of a lot of ground, which she alleged belonged to her, but which her husband had sold and conveyed without her consent by general warranty deed, in which she did not unite; that she continued to live with her husband as his wife until his death in January, 1900. In that case the defendant, as in this, pleaded that the plaintiff's cause of action accrued more than fifteen years prior to the 15th of March, 1894, and that her disability as a married woman was removed by that act, and that her right to recover the land was barred. The trial court sustained this contention, but it was held upon appeal that section 2128 did not by necessary implication repeal so much of section 2506 as applied to married women. In Onions v. C. & C. Elevated Railroad Transfer Bridge Co., 107 Ky., 154, 21 R., 820, 53 S. W., 8, it was contended by the defendant that section 34 of the Civil Code, which provides "that in an action between the husband and wife, and in an action concerning her separate property, and in actions concerning her general property, and in actions for personal suffering or injury to her personal character, in which he refused to unite, she might sue alone," authorized women to

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sue for damages to her real estate, and by necessary implication repealed section 2525 of the Kentucky Statutes of 1899. It was held not to have this effect. Indeed, before the enactment of section 34 of the Civil Code, married women had all the power conferred by that section. If the husband refused to unite, such suit could have been instituted through a next friend. It can not be presumed that the General Assembly intended by implication to repeal a provision of the statute relating to limitation by an act amending and changing the statute which regulated the property rights of the husband and wife.

We therefore conclude in this case that section 2525 of the Kentucky Statutes is unaffected by the act of March 15, 1894, and that the trial court erred in sustaining a demurrer to appellant's reply, and the cause is therefore reversed, and remanded for proceedings consistent with this opinion.

CASE 73—ACTION BY MARTHA HIGGINS AGAINST CLINT STOKES AND OTHERS TO RECOVER LAND.—NOV. 11.

116 664
116 668
116 664
116 668

Higgins v. Stokes, &c.

APPEAL FROM GRAVES CIRCUIT COURT.

FROM AN ORDER DISMISSING THE PETITION PLAINTIFF APPEALS. REVERSED.

FORMER OPINION WITHDRAWN AND THIS OPINION SUBSTITUTED THEREFOR. (FOR FORMER OPINION SEE 24 R., 2427; 74 S. W., 252.)

MARRIED WOMEN—RIGHT TO SUE—LIMITATION—STATUTES—DISABILITY—INPLIED REPEAL.

Held: Kentucky Statutes, 1899, section 2506, providing that if, at the time the right of any person to bring an action for the recovery of real property accrued, such person was a married woman, she

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may, though the period of fifteen years has expired, bring an action within three years after such disability is removed, is not repealed by section 2128, providing that a married woman may take, acquire, and hold property, make contracts, sue and be sued as a single woman, etc.

ROBERTSON & THOMAS, ATTORNEYS FOR APPELLANT.

The plaintiff, Martha Higgins, is the widow of John Higgins, who died January 16, 1900. In December, 1876, her husband sold and conveyed a tract of land belonging to her in which she refused to join, or in any manner release her interest therein.

After the death of her husband she brought this suit for the land upon the idea that limitation began to run against her at the death of her husband in January, 1900.

The appellees in their answer plead that more than three years has elapsed since March 15, 1894, and claim that the statute of that date relative to the rights of married women, removed her disability and that she had but three years thereafter in which to bring her suit, more than fifteen years in all having elapsed since the sale of the land by her husband.

Our contention is that said statute does not remove the wife's disability in the sale of her land, and that her disability continued until the death of her husband.

AUTHORITIES CITED.

Onions v. Covington & Cin. Ry. Co., &c., 107 Ky., 154; Bransom v. Thompson, 81 Ky., 387; Gregory v. Ford, 5 B. M., 471.

D. G. PARK, ATTORNEY FOR APPELLEE.

Our contention is that under our Married Woman's Act of March 15, 1894, the wife holds and owns all her lands to her separate and exclusive use, free from the control of her husband, and may sue and be sued, concerning it, as a single woman; whereby, as a married woman, her "disability is removed," not only authorizing, but requiring her to sue and to recover any such property she may claim to own as though such disability had been removed by death or divorce of her husband, or by a judgment empowering her to sue and be sued as a *feme sole*. And in this case adverse possession having been held against appellant, and her cause of action having accrued for more than fifteen years prior to March 15, 1894, continuing ever since and for more than three years since her disability was removed, her cause of action is barred by limitation beyond any saving clause of our statute.

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AUTHORITIES CITED.

Ky. Stats., secs. 2127, 2128, 2505, 2508, 2525; 13 Am. & Eng. Ency. of Law (1st ed., 739, 740 and authorities cited in note 6; Wood on Limitation (3d ed.) (by Gould, 1901), sec. 240; Cameron v. Smith, 50 Cal., 303; Brown v. Cousens, 51 Me., 301; Acker v. Acker, 81 N. Y., 143; McDanell v. Landrum, 87 Ky., 407; Bankston v. Crabtree Coal Mining Co., 95 Ky., 455; L. & N. R. R. Co. v. Thompson, 2 R., 1110; Sharp v. Stephens Committee, 21 R., 687; Bishop on the Written Laws, secs. 86, 113a, 118a, 123, 165; Kebbe v. Ditto, 93 U. S., 674, 680; Percy v. Cockrell, 4 U. S. (C. C. A. R.), 82-3, 85-6-7-8; Lowe v. Fox, 152 B. Duv., 667.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

This action at law was instituted on the 4th day of January, 1902, by the appellant, Martha Higgins, against the appellees, S. J. Matthews and Clint Stokes, to recover possession of the north half of lot No. 18, in the city of Mayfield which she alleges was conveyed to her by the executors of her deceased father, John M. Gardner, in the division of his real estate among his heirs at law on the 14th day of April, 1863. She further alleges that at the date of this conveyance she was a married woman with several children; and that she and her husband immediately took possession of the property, and lived upon it until December, 1876, when he, without her consent and against her will, conveyed the lot to T. J. Reynolds by a general warranty deed, in which she did not unite; and that shortly after the conveyance to Reynolds her husband moved her and her children from the property, and surrendered the possession thereof to Reynolds; and that she continued to live with her husband as his wife until his death, on the 16th of January, 1900; that the title to the property is still in her; and asked that she be adjudged the possession thereof. The defendants in the first paragraph of their answer deny that plaintiff is the owner of the lot sued for. In the second paragraph they

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plead and rely upon the thirty years' statute of limitation. In the third paragraph they allege that they, and those under whom they claim, have had and held the actual adverse possession of the property described in the petition continually for more than fifteen years prior to the 15th day of March, 1894, and for more than three years thereafter; that plaintiff's cause of action accrued more than fifteen years prior to the 15th of March, 1894, and that her disability as a married woman was removed by the act of the 15th of March, 1894 (Acts 1894, p. 176, c. 76); and that under section 2506 of the Kentucky Statutes of 1899, her right to recover the land in controversy has been lost. The plaintiff filed a general demurrer to the third paragraph of the defendant's answer, which was overruled. Thereupon she filed a reply, in which she denied that her cause of action accrued more than thirty years before the filing of her suit. The defendants thereupon filed a general demurrer to the reply, which was sustained, and, the plaintiff declining to amend, it was ordered that her petition be dismissed, and plaintiff has appealed.

Section 2128, relied on to defeat recovery in this action, is as follows: "A married woman may take, acquire and hold property, real and personal, by gift, devise, or descent, or by purchase; and she may in her own name, as if she were unmarried sell and dispose of her personal property. She may make contracts, sue and be sued as a single woman, except that she may not make any executory contract to sell or convey or mortgage her real estate, unless her husband join in such contract; but she shall have the power and right to rent out her real estate, and collect, receive and recover in her own name the rents thereof, and make contracts for the improvement thereof."

It is very earnestly insisted for appellees that as this stat-

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ute clothes married women with the right to make contracts, sue and be sued, as a single woman, by necessary implication it repealed the statutes of limitation exempting women from its operation in three years after the removal of such disability. To support this contention, we are referred to pages 239, 240, 19 A. & E. En. of Law (2d Ed.). The text referred to is as follows: "While there seems to be some conflict of opinion on the subject, the decided weight of authority is in favor of the view that the married woman's acts removing all the disabilities of married women, and enabling them to sue and be sued, and to contract, as if they were not married, repeal by implication the clauses in the statutes of limitations exempting such women from its operation, and cause the statutes to run against them as if they were single." Numerous decisions from various courts are cited to support the text, but the following significant note by the annotator follows the citation of these cases: "The foregoing cases all deal with the proposition that the mere fact that a married woman could have brought her suit during coverture does not deprive her of the benefit of the exception in her favor in the statute of limitation. And this is the correct rule. There are few, if any, jurisdictions in which a married woman is not able to sue during coverture by her next friend, yet this power has never been held to affect the general exception. If the text, however, relates to a general and complete removal of disabilities, not only as to suit, but in other respects, in such a case there is room for the application of the maxim, '*Cessante ratione legis, cessat ipsa lex.*"

The statute relied on in this case does not remove all the disabilities of married women in the disposal of their real property. On the contrary, it expressly provides that "she may not make an executory contract to sell, convey, or mortgage her real estate unless her husband join in such contract."

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Section 2506 of the Kentucky Statutes of 1899 provides: "If at the time the right of any person to bring an action for the recovery of real property accrued, such person was an infant, married woman or of unsound mind, then such person or persons claiming through them may, though the period of fifteen years has expired, bring an action within three years after such disability is removed."

As this suit was instituted by the appellee within three years after the time of the removal of the disability of coverture, it is apparent that the plea of limitation is not available to defeat recovery, unless section 2128 quoted supra, repeals by implication so much of section 2506 as applies to married women. In Onions v. Covington & Cincinnati Elevated Railroad Transfer Bridge Company, 107 Ky., 154, 21 R., 820, 53 S. W., 8, it was contended for appellee that section 34 of the Civil Code, which provides "that in actions between the husband and wife, and in actions concerning her separate property, and in actions concerning her general property, and in actions for personal suffering or of injury to her personal character, in which he refused to unite, she may sue alone," authorized women to sue for damages to their real estate, and by necessary implication repealed section 2525 of the Kentucky Statutes. In response to this contention, this court said: "Although a married woman, after 1876, might sue alone as to her general estate, she was by no means relieved of the disability of coverture. She was not only under the domination of her husband, but he owned absolutely her personal property. He might reduce to possession her choses in action, and had the right to use all of her real estate, with power to rent it out for not more than three years at a time and receive the rent. . . . It would be contrary to the entire spirit of our laws to allow limitation to run against her during her husband's lifetime. That the

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Legislature did not intend to do so is apparent from the particular language of the exception, and the fact that it was brought over into both the Revised and General Statutes after the adoption of the Code, which empowered the wife to sue in her own name in certain actions." It was held that the Legislature did not have in mind the statute of limitations in the adoption of section 34 of the Civil Code, and that the statute did not run against the married woman until the death of her husband. The act of March 15, 1894, regulating the property rights of husband and wife, does not refer to the statute of limitations, and we can not presume an intention on their part to change the statutes of limitation in so far as married women are concerned, which had been a part of this State since 1846. We therefore conclude that section 2506 of the Kentucky Statutes of 1899 is still in full force and effect, in so far as married women are concerned, unaffected by the enactment of the act of March 15, 1894, regulating the property rights of the husband and wife.

For reasons indicated, the judgment is reversed, with directions to sustain the demurrer to the third paragraph of defendant's answer, and for further proceedings not inconsistent with this opinion.

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CASE 74—ACTION BY DE PAUW UNIVERSITY AGAINST HENRY M. JOHNSON TO RECOVER PROPERTY CLAIMED BY PLAINTIFFS UNDER THE WILL OF WILLIAM HOLMAN, DECEASED.—NOV. 12.

Johnson v. De Pauw University.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

TRUSTS—CHARITIES—VALIDITY—JUDGMENTS—RES JUDICATA—PARTIES—REPRESENTATION—OBJECTIONS—LACHES—ESTOPPEL.

Held: 1. A devise of all of testator's remaining estate after his wife's death, in perpetuity, for the purpose of educating the descendants of two persons named, was not valid as a charitable use.

2. Where certain descendants of a testatrix brought suit for the benefit of themselves and all the other heirs and descendants of the beneficiaries of a trust created by the will, as authorized by Civil Code, section 25, to invalidate the trust and to recover the property embraced therein, in which they were defeated, and no appeal was taken, such judgment was *res judicata* as to the validity of the trust.

3. Where beneficiaries of a testamentary trust brought suit to invalidate the same on behalf of themselves and all other beneficiaries, and no steps were taken by beneficiaries so represented, disapproving such action, for nearly thirteen years, they were estopped to object to such representation on the ground that no order of court was made allowing the plaintiffs in such action to prosecute for the benefit of all the beneficiaries.

C. C. HIEATT, ATTORNEY FOR APPELLANT.

The record in this case discloses these facts:

William Holman died in 1867, testate, leaving several pieces of real estate in Louisville, Ky. The lot on Jackson street, sold under judgment herein, was devised to two colored people, by name of Morgan, for life, and testator's other estate was devised to his wife for life. The will then reads: "And after the death of my beloved wife, Rachael M. Holman, everything given into the hands of the trustees of the Greencastle University in the State of Indiana, in trust, the proceeds of which may be used

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only for the purposes of education of the descendants of George Holman and Jacob Meek."

Greencastle University is now De Pauw University. The lot on Broadway was deeded to Rachael M. Holman for life, remainder to Asbury University (now De Pauw University) in 1869, by deed of Willis Francis and wife, "to be held in trust as required by the provisions of the will of William Holman, deceased." It appears that the property was purchased with the proceeds of other property devised by the will of William Holman which had been sold by the devisees, so that both pieces of property bought by the appellant, Johnson, are held by De Pauw University under the trust set out in William Holman's will above set out.

The effect of this devise is to create a perpetuity, and the devise is void unless the object is a charity. The property is to be held in trust "for the purposes of education of the descendants of George Holman and Jacob Meek." We do not believe that this is a charitable use, it being for the benefit of a particular class of relatives of the testator. A title to the property sold herein can not be supported except on the ground that this devise is valid. If the devise is void the title to the property sold is vested in the heirs of William Holman, deceased, and they are not before the court so as to be divested of title.

These lots were sold by the commissioner of the Jefferson Circuit Court and purchased by appellant, Henry M. Johnson, and he has filed exceptions to the sale in order to test the title to the property.

It further appears that in 1890 suit was filed by three of the heirs-at-law of William Holman, attacking the will on the ground that the trust was void as a perpetuity and was not a charity, but a mere private trust, to which a general demurrer was sustained, the court holding in a written opinion that the trust was a charitable use and valid, and judgment was entered dismissing the petition, from which an appeal was prayed but never taken.

We submit that the judgment in that case would not make the matter *res judicata* on this appeal, as the three plaintiffs who brought that suit for the benefit of all were not by any order of court allowed to so prosecute it for all. It is on account of this uncertainty that the appellant is unwilling to take title to the property until this court has passed upon the validity of this devise.

HARRIS & MARSHALL, ATTORNEYS FOR APPELLEE.

The objection made to the title in this case is that the devise

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to Greencastle (now De Pauw) University is not a charitable use and hence is void for perpetuity. To this we reply:

1. *Res adjudicata.* In the case of Holman v. De Pauw University, the record of which is embraced in this one, two of the heirs of William Holman, the devisor of the first estate, brought suit against De Pauw University for the benefit of themselves and all the heirs, making the allegations required by section 25 of the code and seeking to recover the property embraced in the trust on the ground that the will was void for perpetuity. In this case Chancellor Edwards delivered an elaborate opinion holding the will valid and judgment was rendered dismissing the petition.

The only objection made to the conclusiveness of this judgment is that there was no order authorizing the plaintiffs to sue on behalf of all the heirs. No authority was necessary. The code provides as follows:

"Section 25. If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all."

The right thus given is absolute and does not require any permission of court. The presumption in such cases is that the absent plaintiffs approve of and assent to the bringing of the suit. Flint v. Sparr, 17 B. M., 499.

2. The devise is a charitable use. In support of this proposition we refer to the able opinion of Chancellor Edwards which is copied into the record.

As to the objection that the trust is "for the benefit of a particular class of relatives of the testator" we also refer to the cases of Gass v. Wilhite, 2 Dana, 170, and Ford v. Ford, 91 Ky., 572.

In the first case a trust for the benefit of the Society of Shakers was held to be a charitable use even though the creator of it was himself one of the beneficiaries.

In the Ford case it was held that a devise for the erection of a monument over the graves of the testator and his wife was a charitable devise.

We submit that the judgment below ought to be affirmed.

OPINION OF THE COURT BY JUDGE NUNN—AFFIRMING.

In the year 1867, one William Holman died, a citizen and resident of Jefferson county, Ky., and left a will, which was

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admitted to probate, and was recorded in the Jefferson County Court on the 12th of August, 1867. By his will he made some special devises, and then willed all of his estate to his wife during her life, and then used this language: "And after the death of my wife, everything given into the hands of the trustees of the Greencastle University in the State of Indiana in trust, the proceeds of which may be used only for the purposes of education of the descendants of George Holman and Jacob Meek." It is proper to remark here that the appellee, De Pauw University, is the legal successor to all the rights and privileges of the Greencastle University, named in this will. The testator, William Holman, never had any children. George Holman, the person referred to in his will, was his father, and his mother was the daughter and only child of Jacob Meek. Testator's wife died in the year 1887, and in the year 1890 Nicholas Holman, George W. Holman, and William V. Holman, who claimed to be descendants of George Holman and Jacob Meek, brought an action in the Jefferson Circuit Court against this appellee, in which they sought to have that part of William Holman's will above quoted declared void, in which action it was alleged that George Holman and his wife, a daughter of Jacob Meek, left eleven children, all of whom were then dead, and that each of them had left children, and that there were more than 120 of them, who were the descendants and heirs of George Holman and Jacob Meek; that they resided in many States and territories of the Union, and the places of residence of most of them were unknown, and that the question sought to be litigated in their action involved a common or general interest of many persons; that it was impracticable to bring all of them before the court within a reasonable time, and therefore the plaintiffs, the three persons named, sued for the benefit of all the

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descendants of George Holman and Jacob Meek. In this action they described the property of William Holman left after the death of his widow, and ask that they be allowed to prosecute the action for the benefit of all the heirs of Holman and Meek, and that the court declare the provision in the will named void, and that the property be distributed between the descendants of Holman and Meek. A general demurrer was filed to this petition and the court, construing the provision of the will copied herein, was of the opinion that the devise was for a charitable use or purpose, and sustained the demurrer. The plaintiffs therein objected and excepted, and prayed an appeal to the Court of Appeals which was granted; but no appeal was ever taken from that judgment, which was rendered in the early part of the year 1891. On the 6th day of September, 1902, the appellee, De Pauw University, filed its action in the Jefferson Circuit Court, in which it set forth the will of William Holman, the judgment of the court in the above-described case, and the description of two pieces of real estate which were devised under the will of William Holman, setting forth that this property was out of repair and producing but little income, and asked the court to sell it for the purpose of reinvesting it in other property more remunerative. In this action appellee made Otway C. Sterling and Sidney T. Sterling, who were descendants of George Holman and Jacob Meek, defendants, and alleged that the other descendants of Holman and Meek were numerous, and that it was impracticable to bring them all before the court within a reasonable time, and that the questions involved were of a common and general interest to all of them, and prayed that the defendants named be allowed to defend for all of the descendants of Holman and Meek. In this case the court made an order in conformity with such request, and the defendants answered, admitting

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the allegation that the descendants of Holman and Meek were numerous, and that their places of residence were to them unknown, and that they had no objections to the sale of the property sought to be sold in this action, and prayed that in the event of a sale the court would sufficiently protect the proceeds, to the end that they be devoted to the purposes named in the will of William Holman, and that their answer be taken as the answer of all the descendants of Holman and Meek. Upon proof being heard as to the necessity of a sale of the property, the court made an order directing a sale of it. The commissioners sold it, and appellant, Henry M. Johnson, became the purchaser. Appellant filed exceptions to the report of sale because the title to the lots sold did not pass to the purchaser under the judgment and sale herein, because the devise in the will of William Holman, deceased, of the remainder interest in his estate to the trustees of Greencastle University, in the State of Indiana (now De Pauw University, appellee herein), was void; the effect of the devise being to create a perpetuity, and the object not being a charity. The court overruled the exceptions and confirmed the report of sale, from which action of the court appellant has appealed.

The appellee, by counsel, contends that the devise under consideration is valid, it being for a charitable use, and refers to the cases of Gass v. Wilhite, 2 Dana, 170, 26 Am. Dec., 446, and Ford v. Ford's Ex'rs., 91 Ky., 572, 13 R., 183, 16 S. W., 451. In the opinion of this court these opinions do not sustain the position of counsel. The case in 2 Dana was where the Society of Shakers was sued by one of its members who had withdrawn therefrom, claiming that he had given the society property, and demanded the value of it. His counsel argued that the gift was not a valid one; that it was prohibited by law, not being for a charitable use. The

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court in that case decided that the gift was a valid one, and in the opinion used this language: "So long as piety is recognized, by common assent and by the Legislature, as a valuable constituent in the character of our citizens, the general law must foster and encourage what tends to promote it. In legal estimation, it must be viewed, as what is not only estimable in itself, but as an appurtenance to the characters of individual citizens, of great value to society, for its tendency to promote the general weal of the whole community. . . . In a country like ours, where it is one of the fundamental canons of the political law that there shall be no established religion, and that government shall not actively participate in the support or dissemination of religion of any sort, all such societies—pious institutions of all sorts—must depend upon the eleemosynary contributions of individuals. This would seem to require that the law should esteem such contributions as in a peculiar degree charitable. Whenever the end is truly pious, donations to promote it the law must esteem as really charitable." The court in this case unheld the gift upon the principle that the Society of Shakers was a religious body—a church—and under our statutes such a gift is expressly made valid. See section 317, Kentucky Statutes, 1899. The case of Ford v. Ford's Ex'rs., supra, was where a testator, in his will, directed that a monument be erected over his and his wife's graves. The court upheld this provision of the will upon the grounds that it did not create a perpetuity, that the statute expressly authorizes it, and also that it was for a humane purpose. In this case the court used this language: "Charity, in its most general legal sense, has been said to be a general public use, but the definition given by the eminent counsel in the Girard will case has received judicial approval. It is: 'Whatever is given for the love of God or for the love of our neigh-

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bor, in the catholic and universal sense—given from these motives and to these ends—free from the stain of everything that is personal, private, or selfish, is a gift for charitable uses.'" In the will under consideration the testator, William Holman, gave, without any limitations, and in perpetuity, to appellee, all his estate remaining after his wife's death, for the purpose of the education of the descendants of George Holman and Jacob Meek. This devise was in no sense for a general public use, nor was it given with motives free from the stain of everything that is personal, private, or selfish. It is confined solely to the education of the descendants of two individuals only. If it had been given to the appellee for the general purposes of education, or if it had been given into the hands of trustees for the education of poor children, or the children of a State, county, or a designated community, it would have been valid and upheld as a devise for a charitable use. See Given's Adm'r. v. Shouse, 5 Ky. Law Rep., 419; Peynado's Devisees v. Peynado's Ex'r., 82 Ky., 5, 5 R., 713; Kinney v. Kinney's Ex'r., 86 Ky., 610, 9 R., 753, 6 S. W., 593; and Cromie's Heirs v. Louisville Orphans' Home Society, 3 Bush, 365.

But we are of the opinion that this question in this case is *res adjudicata*, for the reason that three of the heirs of William Holman, the devisor of the first estate, brought suit against De Pauw University for the benefit of themselves and all the heirs and descendants of Holman and Meek, making the allegations required by section 25 of the Civil Code, and seeking to recover the property embraced in the trust on the ground that the will was void for perpetuity, and the court in that case adjudged that the will was valid, and dismissed the petition. The only objection made to the conclusiveness of this judgment is that there was no order of court in that case authorizing the plaintiffs to sue on be-

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half of all the heirs. The provision of the Code with reference thereto is as follows: "Section 25. If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all." Even if an order of court allowing the Holmans to prosecute the action for the benefit of all was necessary, which we do not decide, it is not shown that any of the parties in whose behalf the action was brought disapproved of it, and after the lapse of time—nearly thirteen years—the presumption is that all the descendants of Holman and Meek concurred in its object. See Flint v. Spurr, 17 B. Mon., 513. And in addition to this, it does appear in this case that two of the descendants of Holman and Meek, who represented themselves and all the other descendants, acting under order of court, appeared, and consented and requested that the proceeds of this real estate sold be by the court protected, to the end that the same be devoted to the purpose named in the will of William Holman.

We are of the opinion that the lower court was right in overruling the exceptions filed to the commissioner's report, as the appellant, by his purchase, will obtain a good title to this property. Wherefore the judgment is affirmed.

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CASE 75—ACTION BY BENJAMIN JOHNSON AGAINST CHARLES M. FLEMING, COMMISSIONER, TO RECOVER PLAINTIFF'S SHARE OF MONEY PAID INTO COURT.—(APRIL 28, 1899.)

Johnson v. Fleming, Commissioner.

APPEAL FROM FLEMING CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

DEPOSITS IN COURT—FAILURE OF COURT TO SELECT DEPOSITORY—LIABILITY OF RECEIVER.

Held: Under Kentucky Statutes, section 411, providing that each circuit court may select by order a bank as a place of deposit for money paid into court, and that such bank shall execute bond, where the court has failed to select a depository the receiver or commissioner is liable only for negligence in the selection of a bank for the deposit of money paid into court, or in leaving the money there, and is not an insurer of the solvency of the bank selected by him.

(This case was decided April 28, 1899, and marked not to be reported, but is now ordered to be reported. See 21 R., 4; 50 S. W., 855.)

G. A. CASSIDY, JOSEPH PUMPHREY, W. G. DEARING, ATTORNEYS FOR APPELLANT.

The appellee as commissioner and receiver of the Fleming Circuit Court, received $482.90 for the appellant and deposited it in the Exchange Bank of David Wilson & Co. The order of distribution was made January 18, 1896. The Exchange Bank broke February 13, 1896. Said bank was a private bank owned by David Wilson. We submit that the appellee was not diligent in paying out this money. There were three daily mails to the appellant's postoffice, only five and a half miles from where appellee resided, and he could have sent a check for the money any day, which is the usual way to pay out money. The appellee had no office in Flemingsburg, no place of business where appellant could find him. There was no order of court requiring or directing him to put the money in bank. Section 411 of the Code says that the court may designate, by order, a bank—State or national—in which such money may be deposited, which shall give bond with good security, &c. This was not done, but the

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money was deposited in a private bank without any bond or security.

We claim that by the neglect of a plain duty and taking the law in his own hands, appellee has caused this loss to appellant. He has no right to part with the custody of the money, save at his own risk.

AUTHORITIES CITED.

Ky. Stats., secs. 414, 411; Robinson v. Fleming, 90 D., 713; Wilson v. Mayer, 43 D., 719; Ficener v. Botts, 20 R., 633.

JNO. P. McCARTNEY, ATTORNEY FOR APPELLEE.

The facts are as follows:

By the sale of some land in a suit pending in the Fleming Circuit Court, the sum of $3,670.55 was realized and ordered to be distributed by the master commissioner of said court to the parties entitled thereto, the plaintiff being one of the number, his share being $482.90. The heirs being widely scattered, this money was, by the commissioner, on February 6, 1896, the same day it was received, deposited in the Exchange Bank of David Wilson & Co. Notice was sent by appellee to plaintiff to call and get his money. On February 13, 1896, said bank made an assignment for the benefit of its creditors, said fund being to the credit of appellee as commissioner. Said bank was, up to the time of its assignment, regarded as solvent in the community and as a safe depository for money, and was the bank in which appellee deposited his individual money.

We claim that appellee used reasonable care and diligence in the performance of his duty as commissioner, the same that he used or that any prudent person would use in transacting his own business, and is not liable for the loss of this money. The case was tried by a jury under proper instructions of the court as to appellee's care and diligence and liability, and the jury found that the appellee was not liable, and we submit that this finding should be affirmed.

AUTHORITIES CITED.

Am. & Eng. Ency. of Law, vol. 27, pp. 155, 156; Lewis on Trust, vol. 1, p. 412; Gilmore v. Guenther, 4 Ky. Law Rep. 524.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

The appellee, Charles M. Fleming, was the master commissioner and receiver of the Fleming Circuit Court, and as

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such received in January, 1896, a considerable sum of money, which he deposited as receiver in the Exchange Bank of David Wilson & Co. This bank, at the time, was entirely solvent, and good, but before the money was paid out it failed. It is contended for the appellant that the appellee is responsible for the money, although guilty of no negligence in selecting the bank, or in leaving the money there. There are many cases holding that the obligation of public officers like appellee to keep safely the money committed to them is absolute, without any condition, express or implied, and nothing but its payment when required will exonerate the officer. This rule seems to be largely based on the case of U. S. v. Prescott, 3 How., 578, and some subsequent cases in the Supreme Court of the United States following it; but in U. S. v. Thomas, 15 Wall., 337, the authority of these cases was greatly shaken, so that some of the judges thought it would have been better to have overruled them directly. The current of the latter cases is to the effect that public officers, like other fiduciaries having the custody and management of the property of others, are liable only for the exercise of proper diligence and care. Thus, in the case last referred to, it was said: "A public officer, having property in his custody in his official capacity, is a bailee, and the rules which grow out of that relation are held to govern the case." "The general rule of official obligation as imposed by law is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance of all official oaths. In ordinary cases to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If, in any case, a more stringent obliga-

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tion is desirable, it must be prescribed by statute, or exacted by express stipulations." In York Co. v. Watson, 15 S. C., 1, a county treasurer depositing the public funds in a savings bank of good standing, was held not liable for their loss by the subsequent failure of the bank; the court saying: "If it would be wrong in principle to hold a private trustee responsible for a loss which no care of his could have prevented, would it not be equally wrong to hold a public officer responsible under like circumstances? The liability of a bonded officer . . . arising from official duty . . . is governed by the principles of the common law." This case is followed and approved in State v. Houston, 78 Ala., 576. In Wilson v. People, 19 Colo., 199, 34 Pac., 944, the clerk of a court who in that State discharges duties similar to those imposed on appellee deposited the money in his custody in a bank of reputed solvency, acting as a prudent man would. The bank afterwards failed, and the money was lost. Holding that the clerk was not responsible, the court said: "We believe the true rule is that a public officer who receives money by virtue of his office is a bailee, and that the extent of his obligation is that imposed by law; that, when unaffected by constitutional or legislative provisions, his liability is measured by the law of bailment." The same rule was adopted in Tennessee, where a county trustee had deposited the money in a bank of undoubted standing, which had afterwards failed, so that the money was lost without fault on his part. See State v. Copeland (Tenn. Sup.) 34 S. W., 427. The case of People v. Faulkner, 107 N. Y., 477, 14 N. E., 415, was substantially similar to this case, and in a well-considered opinion the court held the officer not responsible. See, also, Cumberland Co. v. Pennell, 31 Am. Rep., 284; and Healdsburg v. Mulligan (Cal.) 45 Pac., 337. But it is insisted that a different rule prevails in this State

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as to receivers, because of our statutes. The provisions relied on are as follows:

"Each circuit court may select and designate by order a bank, State or national, as a place of deposit for moneys paid into court. Such bank shall before receiving the deposit, execute bond, with good sureties, to be approved by the court, in a penal sum to be fixed by the court, payable to the Commonwealth, and conditioned to pay all moneys deposited by the receiver or commissioner upon any check drawn by him under order of court.

"It shall be the duty of the receiver, or commissioner, acting as such, to receive into his custody and safely keep all moneys paid to him under order of court, and if any depository has been selected by the court, he shall, as soon as practicable deposit such moneys therein. Money paid into the court shall be paid out by the commissioner or receiver on the written order of the court, attested by the clerk and not otherwise."

"The court shall, when practicable, require the depository to pay interest on the deposit, and such interest shall be devoted, under proper rules or orders of the court, to the payment of costs in each case."

Kentucky Statutes, sections 411, 412, 415.

The purposes of these provisions was not to add to the liabilities of the receiver, but to provide for the greater security of the funds and to make them interest-bearing. It will be observed that the receiver is charged with no duty in regard to the appointment of the depository. This is left entirely to the circuit court, and is a matter of discretion with him; he may or may not make a selection, as he may deem best. After he had acted, the receiver is charged with no duty until the depository gives bond. Until all this is done, the receiver must take such care of the money com-

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ing to his hands as good judgment and diligence require. He is not responsible for the non-action of his superior officer, over whom he has no control. He would not be heard to complain of the action of the circuit court, and, being a subordinate officer, would not be expected to look after matters left by law to the discretion of his superior.

Under proper instructions, the jury found in favor of appellee on the question of negligence. We think the evidence supports their finding. The appliances of a bank afford so much better security for money against fire and theft that business men almost universally put their money in bank, rather than keep it themselves. For the receiver to have kept this money himself would have been much greater evidence of negligence than the putting of it in a bank universally recognized as solvent. Appellant himself had in the same bank to his own credit a much larger sum than that for which he proposes to hold the receiver responsible, and the evidence is very persuasive that, if he had drawn the fund sued for from the receiver, it would simply have been placed to his credit with his other funds in the same bank, and he would be now in the same situation, substantially, as he is. Judgment affirmed.

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CASE 76—ACTION BY LEE BASKETT AND OTHERS AGAINST R. C. ARNOLD AND THE FARMERS' BANK AND TRUST CO. AS TRUSTEE FOR RANKIN EASTIN TO ENFORCE A MORTGAGE LIEN ON BOAT AND BARGES.—NOV. 12.

Arnold, &c., v. Eastin's Trustee, &c.

APPEAL FROM HENDERSON CIRCUIT COURT.

FROM THE JUDGMENT BASKET AND ARNOLD APPEAL AND EASTIN'S TRUSTEE PROSECUTES A CROSS-APPEAL. REVERSED AS TO THE TRUSTEE AND AFFIRMED AS TO OTHERS.

ADMIRALTY—VESSELS—BARGES—MORTGAGES — RECORD — FRAUDULENT CONVEYANCES—BANKRUPTCY—RIGHTS OF TRUSTEE—LIENS—DELIVERY OF CHATTELS—STATE COURTS—JURISDICTION—WHAT LAW GOVERNS.

Held: 1. Where the home port of a vessel was Evansville, Ind., the recording of a mortgage thereon in the office of a county clerk in Kentucky was ineffectual to impart constructive notice thereof to creditors of the owner of the vessel, under Revised Statutes of United States, section 4141 [U. S. Comp. St., 1901, p. 2808], requiring all vessels to be registered at the nearest port to which the owner resides, and section 4192 [U. S. Comp. St., 1901, p. 2837], providing that no bill of sale or mortgage thereon shall be valid unless recorded in the office of the collector of customs where such vessel is registered.

2. Where a mortgage on a vessel was invalid as to creditors for failure to record the same in the surveyor's office of the home port as required by Revised Statutes of United States, sections 4141, 4192 [U. S. Comp. St., 1901, pp. 2808, 2837], the subsequent recording of the mortgage in such office was ineffectual as to antecedent creditors.

3. Under Revised Statutes of United States, section 3 [U. S. Comp. St., 1901, p. 4], providing that the word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water, barges used for the transportation of coal on an inland river were "vessels," within Revised Statutes, sections 4141, 4192 [U. S. Comp. St., 1901, pp. 2808, 2837], providing for the registration thereof, and requiring bills of sale and mortgages thereon

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to be recorded in the office of the surveyor at the home port.

4. Evidence reviewed, and *held* to support a finding that a bill of sale of a vessel and barges from an insolvent to a creditor was made with intent to defraud creditors.

5. Under Bankruptcy Act July 1, 1898, chapter 541, sections 70a, 67e, 30 Statutes, 565, 564 [U. S. Comp. St., 1901, pp. 3451, 3449], providing that the property of a bankrupt shall be vested in the trustee by operation of law from the date of the adjudication, and authorizing the trustee to attack conveyances of the bankrupt's property made within four months prior to the filing of the petition, with intent on the part of the bankrupt to defraud his creditors, where a fraudulent bill of sale executed by a bankrupt was not recorded so as to be valid against his creditors until within four months prior to his adjudication as a bankrupt, the trustee was entitled to invalidate the same, though the bill was executed more than four months prior to the filing of the bankruptcy petition.

6. Where, after the execution of a fraudulent bill of sale of certain vessels, the buyer paid various claims which were liens thereon, and after the sale had been adjudged void at the instance of the seller's trustee in bankruptcy the buyer voluntarily surrendered the vessel to the trustee, the court had no further jurisdiction to require the trustee to reimburse the buyer to the amount of the liens so paid as a condition to decreeing a delivery to the trustee.

7. A contract to furnish material for the construction of a dock, reserving a lien thereon to the seller, is not a matter of maritime jurisdiction, within the exclusive cognizance of the Federal courts.

8. Where a contract to furnish materials for the construction of a dock, reserving a lien thereon to the seller, was made in Indiana, and at that time the dock was a mere chattel within that State, the right of the seller to enforce such lien on the dock, which was subsequently placed in the Ohio river, and within the jurisdiction of the Kentucky courts, must be determined by the laws of Indiana.

9. Under Burns' Revised Statutes of Indiana, 1901, section 6638, providing that no mortgage of goods shall be valid against third persons unless recorded in the recorder's office of the county where the mortgagor resides within ten days after execution thereof, a mortgage made in Indiana, not so filed and recorded, is void as against creditors of the mortgagor.

BROWN & VANCE, ATTORNEYS FOR APPELLANT, LEE BASKETT.

PROPOSITIONS DISCUSSED.

1. A barge is not such a vessel as is required to be registered

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under the maritime laws of the United States; is simply a chattel, and a mortgage given thereon should be recorded in the office of the clerk of the county court in the county in which the said barge is kept. Rev. Stats. U. S., sec. 4132.

2. A mortgage recorded in the proper office before proceedings in bankruptcy are instituted and before a creditor has acquired title to the mortgaged property is notice to the world and good against a bankrupt, his trustee or creditor. Com. v. Robinson, 96 Ky., 553.

3. An unrecorded mortgage is valid as against a bankrupt, his trustee or antecedent creditors. Rev. Stats. U. S., sec. 4192; Ky. Stats., sec. 496; Bridgford, Trustee, v. Barbour, etc., 78 Ky., 535; Todd v. Johnson, 90 Ky., 548; Bank of Commerce v. Payne, 10 Ky. Law Rep., 354; Milburn Wagon Co. v. Edwards, 7 Ky. Law Rep., 835; Tandy v. Robbins, 8 Ky. Law Rep., 265 Cyc. of Law and Procedure, vol. 4, p. 218; In re Boazman, 2 Am. Bankr. Rep., 809; Kelley v. 49 N. Y., 595; Cook v. Tullis, 18 Wall. (U. S.), 332; Ex parte Dalby, 1 Lowell (U. S.), 431; Cyc. of Law and Procedure, vol. 5, p. 342; Exchange and Deposit Bank of Owingsville v. Stone, 78 Ky., 121; Casey v. La Societe De Credit Mobilier, 2 Woods (U. S.), 77; Donaldson v. Farwell, 93 U. S., 631; Winson v. McLellan, 2 Story (U. S.), 492; Potter v. Coggeshall, 19 Fed. Cas. No. 11, 322; Lorzeas v. Porter, 7 Rep. (Pa.), 216; Baldwin v. Crow, 86 Ky., 679; Klein v. Bensent, 16 R., 349; Jones Stationery Co. v. Jeffrey, 9 R., 148.

4. Where a creditor has endeavored to obtain a fraudulent preference by joining in the conveyance of the insolvent debtor's estate, such conveyances being void, his claim should be postponed to claims of other creditors. Parker v. Wilcox, 3 R., 386.

MONTGOMERY MERRITT, ATTORNEY FOR APPELLANT ARNOLD.

POINTS AND AUTHORITIES.

1. Acts of bankruptcy do not invalidate sales, mortgages or assignments made in good faith and for a valuable consideration, though recorded within four months of the adjudication in bankruptcy. Clark v. Hezakiah, 24 Fed. Rep., 663; Goss v. Coffin, 22 A. R., 585; Stuart v. Platt, 101 U. S., 818, L. C. ed.; Dudley v. Eastin, 104 U. S., 669; 95 U. S., 590; 14 Wal., Book 20, 800; 15 Wal., 198; Collier on Bankruptcy, 299, 312, 321, 375, 381, 408, 422; In re Wright, 96 Fed. Rep., 187; In re Adams, 97 Fed. Rep., 188; 81 Ky., 123; 86 Ky., 679; 101 Fed. Rep., 413; Bordes v. First National Bank, 178 U. S., 1177, L. C. Ed.; Bankrupt Act of 1898, secs. 67, 70.

2. Fraud. Notice. Summers v. Taylor, 80 Ky., 429; Beckett

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v. Sawyers, 91 Ky., 106; Ky. Stats., sec. 1906; Edwards v. Tandy, 78 Ky., 168.

3. Liens. 9 N. E., 707, Winchester Wagon Works v. Carmen, 107 Ind.; Short v. Tinsley, 1 Met., 397; Southworth v. Casey, 78 Ky., 395, 105.

4. Judgment for use of boat and barges. Lillard v. Whittaker, 3 Bibb., 92; Green v. Powell, 1 B., 499; 14 Bush, 658; 78 Ky., 42; Sutherland on Damages, vol. 3, sec. 114.

5. Recording. U. S. Rev. Stats., sec. 4192; 74 U. S., 211, L. C. Ed.; 75 U. S., 473; 100 U. S., 520; 53 A. R., 436.

WILLIAM W. WATTS, ATTORNEY FOR THE TRUSTEE.

POINTS AND AUTHORITIES.

1. Where the vendor and vendee of certain personal property were close friends; proposing to stick to each other; in constant correspondence with each other; the one the debtor, the other his creditor; the debtor insolvent; and an instrument of writing was executed purporting to be a bill of sale of a boat and barges worth $9,000 to $14,000, the consideration being $2,500 cash and $538 old debt; the vendee being a boat builder, skilled in the knowledge of the values thereof and having built some of said barges; there being no delivery of said bill of sale or said boat and barges to the vendee, the vendor remaining in possession, and there being no visible change of possession; the said bill of sale, with a policy of insurance payable to the vendor, with loss clause payable to the vendee, as his interest might appear, being placed in escrow with a third party, deliverable only on the joint order of the vendor and vendee; the said bill of sale and insurance policy, with the consent of the vendee being subsequently withdrawn from the hand of the escrowant; the loss clause on the policy which had been made payable to the vendee, as his interest might appear, being then canceled, the vendee having no further interest therein; the continued possession of said bill of sale and boat and barges by said vendor for eight months—until after his failure; his then delivery of the boat and barges to a receiver, appointed on the ground of insolvency, to take charge of certain of his property, with a statement under oath that said boat and barges belonged to him, the vendor; his subsequent delivery of the bill of sale to the vendee; with letters from the vendor to the vendee about that time, saying the vendor would "tie" to the vendee throughout the whole matter; keeping the vendee advised in all details of the attacks to be made upon the bill of sale by creditors and all details of

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the business; the vendee taking possession of the boat and barges, because the receiver was not entitled to hold them under the order of his appointment; the vendee buying in the other property of the vendor, sold at the trustee's sale, the vendor then appearing in the role of manager thereof in the employment of the vendee; books and letters of the vendor disclosing a loan, if anything, instead of a sale of the boats; both vendor and vendee making contradictory statements in material matters, dodging, evading and not remembering important matters and details—with other incidental facts concerning the transaction, the allegations that a transfer was made under that bill of sale with intent to hinder, delay and defraud the creditors of the vendor, and that the facts were known to the vendee, and that he participated in the fraud, are sustained.

Whether the bankruptcy act, the statutes of Indiana, or the statutes of Kentucky are applied to such a case, the facts show such fraud as will avoid the transfer of the vendor to the vendee in favor of the trustee in bankruptcy for the benefit of creditors, and that without restitution to the vendee. 8 Am. & Eng. Ency. of Law (1st ed.), title "Fraudulent Debtors," pp. 781-4; Bump's Fraud. Con., 4th (Gray) ed., secs. 612-614; Bankruptcy Act 1898, secs. 70a, 4, 67e, 60-a, b, 57g, 1(25) 67a, d, 1 (15) 3a, 3b, 1; Brandenburg on Bankruptcy, 3d ed. sec. 1104, and cases cited; Collier on Bankruptcy, 3d ed., 32, and cases cited; Re Nugent, 184 U. S., 1; Re David A. Sachs, Sup. Ct., advance sheets Law. Co-op. Ed., June 15, 1903; Rev. Stats. U. S., secs. 4141, 4192; White's Bank v. Smith, 7 Wall., 646; Morgan v. Parham, 16 Wall., 476; Burns' Ind. Statutes, secs. 6638, 6636, 6649; Granger v. Adams, 90 Ind., 87; Seidner v. Bible, 43 Ind., 230; State v. Griffin, 16 Ind. App. Rep., 558; Ames v. Warren, 76 Ind., 512; Geisendorff v. Eagles, 70 Ind., 414; Rose v. Collier, 76 Ind., 591; Powell v. Stickney, 80 Ind., 310 (citing Bump's Fraud. Con., 62; Kane v. Drake, 27 Ind., 29); Seavey v. Walker, 108 Ind., 78; St. Joseph, &c,. v. Wilson, 133 Ind., 465; Stinson v. Minor, 34 Ind., 89; Ky. Stats., sec. 1906; Wood v. Goff's Curator, 7 Bush, 63; Short v. Tinsley, 1 Met. (Ky.), 397; Whitaker v. Garnett, 3 Bush, 402; 1 Johnson's Chy. Rep., 478; Huffman v. Leslie, 22 Ky. Law Rep., 1982; Violett v. Violett, 2 Dana, 323; Summers v. Taylor, 80 Ky., 429; White v. Graves, 7 J. J. Mar., 527; Ky. cases under Act of 1867: Anderson's Assignee v. Anderson, 80 Ky., 638; Stark's v. Curd, 88 Ky., 164; Eversole v. Adams, 10 Bush, 83; Linthicum v. Fenley, 11 Bush, 131; Boone v. Hall, 7 Bush, 67; Northern Bank v. Cooke, 13 Bush, 340.

2. A creditor guilty of actual fraud in receiving a preference is not allowed to share in the estate till the other creditors are satisfied. White v. Graves, 7 J. J. Mar., 527.

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3. Indiana statute as to sale of "goods" in fraud of creditors includes horses, cows, buildings and steamboats. St. Joseph, &c., v. Wilson, 133 Ind., 465; Stinson v. Minor, 34 Ind., 89.

4. Sales in fraud of creditors under Indiana statutes set aside: Geisendorff v. Eagles, 70 Ind., 414; Rose v. Collier, 76 Ind., 591; Powell v. Stickney, 80 Ind., 310; Kane v. Drake, 27 Ind., 29; Seavey v. Walker, 108 Ind., 78.

5. Mortgage under Indiana statutes is void as to creditors unless recorded within ten days, as required by the statute. Granger v. Adams, 90 Ind., 87; Seidner v. Bible, 43 Ind., 230; State v. Griffin, 16 Ind. App. Rep., 558; Ames v. Warren, 76 Ind., 512.

6. Sales in fraud of creditors under Kentucky statutes set aside. Ky. Stats., 1906; Wood v. Goff's Curator, 7 Bush, 63; Short v. Tinsley, 1 Met., 397; Whitaker v. Garnett, 3 Bush, 402; 1 Johnson's Chy. Rep., 478; Huffman v. Leslie, Ky. Law Rep., 1982; Violett v. Violett, 2 Dana, 323; Summers v. Taylor, 80 Ky., 429.

7. The date of the record of the instrument is the date from which the limitation of four months begins to run as to preferences and fraudulent conveyances under the bankruptcy act. But transfers void under State laws as in fraud of creditors may be attacked and set aside under those laws. Bankruptcy Act, 1898, secs. 67c, 60a, b, 57g, 1 (25), 3b (1), 67a, 67d; Collier on Bankruptcy (3d ed.), 44.

8. Statutes as to recording must be followed to the letter under section 67e, Bankruptcy Act. Chesapeake, &c., Co. v. Seldner, 122 Fed., 592.

9. The failure to record a mortgage, executed many months before, until after the debtor has gone into the hands of a receiver on the ground of insolvency when the effect of the enforcement of the instrument will be to give to the person claiming thereunder a greater percentage of his indebtedness than other creditors of the same class, is fatal to the instrument as security for the debt under the provisions of the bankrupt act, where the State laws "require" or "permit" such instruments to be recorded in order to impart notice, and it must be deemed a preference thereunder and therefore set aside. Bankrupt Act, 1898, secs. 57g, 60a and b, 67a, d, e; Pirie v. Chicago, &c., Co., 182 U. S., 438; Chesapeake, &c., Co. v. Seldner, 122 Fed., 592.

10. Tugs and barges are "vessels" within the provisions of the statutes of the United States. Sec. 3, R. S. U. S.; 1 Am. and Eng. Ency. of Law (2d ed.), 655; Disbrow v. Walsh, 36 Fed., 607.

11. Vessels of the United States must be enrolled at the home port of the owner. Bills of sale, mortgages, etc., must also be

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there recorded. That port is the one nearest the residence of the owner or managing owner of the craft. Evansville is the home port for a resident of Evansville, while Louisville is the home port for a resident of Leavenworth, Indiana. Sec. 2568, R. S. U. S.; sec. 4141, R. S. U. S.; sec. 4192, R. S. U. S.; White's Bank v. Smith, 7 Wall., 646; Morgan v. Parham, 16 Wall., 476.

12. Courts will take judicial cognizance of geographical positions and distances. U. S. v. La Vengeance, 3 Dall., 297; The Appollon, 9 Wheat., 374; Peyroux v. Howard, 7 Pet., 342; Brown v. Piper, 91 U. S., 37.

13. One can not be a claimant to the ownership and a claimant to lien upon the same property at the same time in the same suit unless he shall plead alternatively, such a state of facts as makes his relationship to the property doubtful, and thereby entitle him to aid from the court to determine his relationship. In the absence of such state of facts, a party can not prosecute an appeal from a judgment dismissing his claim to title and at the same time by amended pleading set up liens against the property, and the objection to the amended pleading should have been sustained. 19 Am. & Eng. Ency. Law, 2d ed., 11; Arnold v. Delano, 4 Cush. (Mass.), 38; Lickborrow v. Mason, 6 East., 21 (note).

14. To recover rentals, demand is unnecessary in a suit to set aside a fraudulent conveyance. A lease containing a clause preserving all rights of both parties as to ownership of the property in dispute makes demand unnecessary, as such clause gives notice and constitutes the essential element of demand. But even if necessary, demand was waived by pleading and going to the proof and judgment without objection that demand was not alleged. Farmers' & Traders' Bank v. F. & D. Co., 22 Ky. Law Rep., 22.

15. The administration of a bankrupt's estate is exclusively within the jurisdiction of the bankruptcy courts. On adjudication all the bankrupt's property vests in the trustee, except that which is exempt under State laws. Re Nugent, 184 U. S., 1; Re David A. Sachs (Sup. Ct.), Advance Sheets Law Co-op., Ed. June 15, 1903; Boone v. Hall, 7 Bush, 67.

16. Where a court can not have jurisdiction over the subject-matter of the action, consent can not give jurisdiction. Brown v. McKee, 1 J. J. Mar., 472; Barton v. Barton, 80 Ky., 214; Newman's Pl. & Pr., 47-53.

17. The State court has no jurisdiction to enforce maritime liens. It has jurisdiction to try the question of title under fraudulent conveyances; and also over a mortgage upon the craft

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which is a mere security for a debt. Taylor v. Carryl, 61 U. S., 583; Moran v. Sturges, 154 U. S., 258; The Glide, 167 U. S., 606; 2 Jones on Liens (2d ed.), secs. 1729-30; The John Jay, 17 How., 399; Schuchardt v. Babbage, 19 How., 239.

18. State courts have jurisdiction of suits by trustees in bankruptcy to recover property fraudulently conveyed and preferences in fraud of the act. Anderson's Assignee v. Anderson, 80 Ky., 638; Starks v. Curd, 88 Ky., 164; Eversole & McCarty v. Adams, 10 Bush. 83; Linthicum v. Fenley, 11 Bush, 131; Boone v. Hall, 7 Bush, 67; Northern Bank v. Cooke, 13 Bush, 340.

19. The defense of a *bona fide* purchaser for value must allege specifically the facts constituting the *bona fides*, and must make out his case in the proof. Boone v. Chiles, 10 Pet., 211.

J. E. WILLIAMSON, ATTORNEY FOR FARMERS' BANK AND TRUST CO., TRUSTEE.

1. The transfer of the property involved in this suit was contrary to subdivisions 1 and 2, section 3, of the Bankruptcy Act, which are as follows:

"Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors or any of them; or, (2) transferred while insolvent any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors."

The intent of the debtor is conclusively presumed from the result. Sec. 60a.

It is only necessary that the creditor shall have reasonable cause to believe that a preference was intended. Sec. 60b. "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." Sec. 67a. Liens in good faith upon a present consideration are not good unless recorded, if record thereof was necessary to impart notice. Sec. 67c.

Such record was necessary. Sec. 4192 U. S. Statutes.

Property transferred in violation of the act "remains a part of the assets, etc., of the bankrupt, and passes to the trustee." Sec. 67e.

Section 57g: "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences. Carson, Pirie & Co. v. Chicago Title, &c., Co., 182 U. S., 438; 45 l. ed., 1171, 21 Sup. Ct. Rep., 906.

In section 60a, it is provided: "A person shall be deemed to

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have given a preference, if, being solvent, he has procured or suffered a judgment to be entered against him in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debts than any other of such creditors of the same class."

Sub-division b. provides that if the person receiving such preference, or to be benefited thereby, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

2. Insolvency. Sec. 1, subdiv. 15, of the Bankruptcy Act.

3. What is sufficient notice to a creditor. Toof v. Martin, 13 Wall., 40; Rice v. Melendy, 41 Ia., 399; Scammon v. Cole, 3 Clic. 472, Fed. Cas. No. 12, 432; Grant v. Bank, 97 U. S., 80; Stucky v. Bank, 108 U. S., 74; May v. Le Claire, 18 Fed., 164; Otis v. Hadley, 112 Mass., 100.

Cases cited in section 60 and 199 and succeeding pages of Black on Bankruptcy.

The bill of sale of the boat should have been recorded as required by section 4192 of the U. S. Statutes.

No bill of sale is valid under the foregoing section except as to the grantor, his heirs and devisees, and persons having actual notice unless recorded.

4. The Edgar should have been registered at Louisville instead of Evansville. U. S. Revised Statutes, sec. 441; White's Bank v. Smith, 7 Wall., 646; Morgan v. Parham, 17 Wall., 476.

5. Registration at Evansville was a nullity and was insufficient to impart notice. 20 Ency. (1st ed.), 548, 549; Astor v. Wells, 4 Wheat. (U. S.), 466; Garrison v. Haydon, 1 J. J. Marsh. (Ky.), 222; 19 Am. Dec., 70; Stewart v. McSweney, 14 Wis., 468; Bell v. Fry, 5 Dana. (Ky.), 344; Bither v. Buswell, 51 Me., 601; Cohen v. Barton (Md. 1891), 21 Atl. Rep., 63; London v. Youmans, 31 S. Car., 147; Davis v. Loftin 6 Tex., 489; Vaughn v. Bell, 9 B. Mon. (Ky.), 477; Singleton v. Young, 3 Dana (Ky.), 559; Reynolds v. Case, 60 Mich., 76; Powers v. Freeman, 2 Lans. (N. Y.), 127.

6. The transfer to Arnold is void under subdivision 2, sec. 67 of the Bankruptcy Act.

7. Notice of fraudulent intent. 14 Ency. (2d ed.), 289; Bump on Fraud. Con., sec. 183; see collection of cases on page 210, Bump; McFadden v. Ross, 126 Ind., 341.

8. Knowledge by Arnold of Eastin's intention is sufficient without former's participation. Huffman v. Leslie, 66 S. W., 822, late Ky. case; Bump, sec. 184.

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9. Knowledge of facts sufficient to excite the suspicions of a prudent man, and to put him on inquiry. Mills v. Howeth, 19 Tex., 257, 70 Am. Dec., 331; Green v. Tantum, 19 N. J. Eq., 105, s. c., 21 N. J. Eq., 364; Jackson v. Mather 7 Cow., 301; Smith v. Henry, 2 Bailey, 118, s. c., 1 Hill, 16; Avery v. Johann, 27 Wis., 246; Hathaway v. Brown, 18 Minn., 414; Nichols v. Crittenden, 55 Geo., 497; Phillips v. Reitz, 16 Kans., 396; Burnham v. Brennan, 42 N. Y. Sup., 49; Massie v. Engart, 32 Ark., 251; State v. Eertel, 6 Mo. App., 6; Simms v. Morse, 2 Fed. Rep., 325; Stix v. Keith, 85 Ala., 465, 5 So., 184; Catchings v. Harcrow, 49 Ark., 20, 3 S. W., 884; Knower v. Cadden Clothing Co., 57 Conn., 202, 17 Atl., 580; Heaton v. Prather, 84 Ill., 330; Redhead v. Pratt, 72 Ia., 99, 33 N. W., 382; Gollober v. Martin, 33 Kans., 252, 6 Pac., 267; Biddinger v. Wiland, 67 Md., 259, 10 Atl., 202; Shaw v. Spencer, 100 Mass., 390; Kitch v. St. L. K. C. & N. Ry. Co., 69 Mo., 224; Holcombe v. Ehrmauntraut, 46 Minn., 397, 49 N. W., 191; McVeigh v. Baxter, 82 Mo., 518; Frederic v. Allgaier, 88 Mo., 598; Moore v. Williamson, 44 N. J. Eq., 496; 1 L. R. A., 336, 15 Atl., 587; Beels v. Flynn, 28 Neb., 575, 44 N. W., 732; Bollman v. Lucas, 22 Neb., 796, 36 N. W., 465; Edwards v. Ried, 39 Neb., 645, 58 N. W., 202; Blum v. Simpson, 71 Tex., 628, 9 S. W., 662; Hickman v. Trout, 83 Va., 478, S. E., 131; Batchelder v. White, 80 Va., 103; Rindskopf v. Myers, 87 Wis., 80, 57 N. W., 967; Bartles v. Gibson, 17 Fed., 597; Singer v. Jacobs, 11 Fed., 361.

10. This transaction was had at Leavenworth, Indiana. The law of that State as to means of knowledge should be consulted. Wright v. Brandis, 1 Ind., 336; Pow v. Beckner, 3 Ind., 476; Peck v. Hunter, 7 Ind., 299; see specifications following.

11. Badges of frauds. Secs. 63-65, Bump.

(1) Failure to pay taxes. Bulkley v. Buffington, 5 McLean, 457; Judge v. Vogel, 38 Mich., 569; Greenback v. Ferguson, 58 Fed., 18; Shober v. Wheeler, 113 N. C., 370, 18 S. E., 328.

(2) Inadequacy of consideration. Sec. 57, Bump; Yoder v. Standiford, 7 Mon., 478; Bowles v. Shoenberger, 2 B. Mon., 372; Trimble v. Ratcliffe, 9 B. Mon., 511; 12 B. Mon., 32; Twine's Case, 3 Rep., 80b; May on Fraud. Con., p. 87; 14 Ency. (2d ed.), 516, 517, 518; Oppenheimer v. Guckenheimer, 39 Fla., 617.

(3) Subsequent employment of Eastin by Arnold. 14 Ency., p. 516 (2d ed.).

(4) Retention of possession by Eastin. Dale v. Arnold, 2 Bibb. (Ky.), 605; Hughes v. Eastin, 4 J. J. Marsh. (Ky.), 572, 20 Am. Dec., 230; Arnold v. Com., 8 B. Mon. (Ky.), 111; Neal v. Robertson, 2 Dana (Ky.), 87; Meredith v. Sanders, 2 Bibb. (Ky.), 101; Enders v. Williams, 1 Met. (Ky.), 346; Foster v. Griggsby,

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1 Bush. (Ky.), 86; Daniel v. Morrison, 6 Dana (Ky.), 182; Kennedy v. Covington, 4 J. J. Marsh. (Ky.), 538; Stephens v. Barnett, 7 Dana (Ky.), 257; Vanmeter v. Estill, 78 Ky., 456; Morton v. Ragan, 5 Bush (Ky.), 334; Kenton v. Ratcliff (Ky., 1899), 49 S. W. Rep., 14; Jarvis v. Davis, 14 B. Mon. Ky., 124; Waller v. Cralle, 8 B. Mon. (Ky.), 11; Brummel v. Stockton, 3 Dana (Ky.), 135; Robbins v. Oldham, 1 Duv. (Ky.), 28; Cummins v. Griggs, 2 Duv. (Ky.), 87, 87 Am. Dec., 482; Anthony v. Wade, 1 Bush. (Ky.), 110; Allen v. Johnson, 4 J. J. Marsh. (Ky.), 235; Woodrow v. Davis, 2 B. Mon. (Ky.), 298; Kendall v. Hughes, 7 B. Mon. (Ky.), 368; Wash v. Medley, 1 Dana (Ky.), 269; Van Meter v. Estill, 78 Ky., 456.

(5) Buying property for which the purchaser has no apparent use. 14 Ency., p. 516 (2d ed.); Grubbs v. Greer, 5 Coldw. (Tenn.), 160; Mobile Bank v. Harris, 6 La., 811.

12. Sufficiency of evidence. Lutkenhoff v. Lutkenhoff (Ky., 1891), 17 S. W. Rep., 863; Daniel v. Brandenby (Ky., 1891), 20 S. W. Rep., 255; Carroll v. Ward (Ky., 1894), 25 S. W. Rep., 6; Burgroff v. Bagby (Ky., 1893), 32 S. W. Rep., 940; Brandenburg v. Louisville, &c., Co. (Ky., 1896), 36 S. W. Rep., 7; Hirsch v. Norton, 115 Ind., 541; Long v. Stockwell, 55 N. H., 561.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING AS TO TRUSTEE, AND REVERSING AS TO OTHERS.

Rankin Eastin operated a coal mine near Spottsville, Ky. His property consisted of a coal mine at the above place, with a storehouse and mining equipments, with an office, coal dock, scales, etc., at Evansville, Ind., and a steamer, called the "Edgar," formerly the "Russar," and thirteen coal barges, plying between the mines and Evansville and elsewhere. There were various liens upon the property, some on the mines and other property at Spottsville, and some claimed on the boat and barges. A receiver was appointed in the Henderson Circuit Court at the instance of a lien creditor, seeking the enforcement of a mortgage upon the mines and mining equipments. Thereafter certain creditors of Eastin filed petitions in involuntary bankruptcy against him, resulting in his being adjudged a bankrupt in May of 1901. On March 28, 1900, appellant, Lee Baskett, had become the surety of Eastin to the Planters' State Bank of Henderson on a note

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for $1,500. Eastin executed a mortgage to Baskett as indemnity for his suretyship upon the following described property: "My steamer Russar and six barges, all now in Green river, at Spottsville, Ky., warranted free from all incumbrances." This mortgage was acknowledged and recorded in the clerk's office of the Henderson County Court on the day of its execution March 28, 1900. Eastin then lived at Evansville, Ind. Spottsville is in Henderson county. The note was subsequently part paid, and the balance renewed to the amount of $1,000, which Baskett was compelled to pay. He brought this suit on August 1, 1901, to enforce his mortgage lien upon the boat and barges. By amendments, R. C. Arnold was made a party defendant, and the Farmers' Bank & Trust Company the trustee in bankruptcy for Rankin Eastin, was also made a party defendant, under the allegation that they were claiming some interest in the steamboat and barges.

Arnold answered that he had sold the barges to Eastin upon the express condition that their title should remain in him until paid for; that Eastin had not paid for the barges on August 20, 1900, when he re-sold same to Arnold, and also sold him the steamer Edgar, and executed a bill of sale of that date therefor. Arnold's bill of sale was not lodged for record nor recorded in the customs office at Evansville until the 13th day of March, 1901. It was executed and dated August 20, 1900.

Baskett's mortgage was recorded in the same office on the 1st day of April, 1901. The bankruptcy proceedings were instituted about the 6th day of April, 1901. The floating dock at Evansville, which Eastin owned, was also claimed to be in the lien to Arnold for some $735, because Arnold claimed that he had furnished some of the lumber and means with which to build the dock.

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Arnold, &c.

1 Bush. (Ky.) 1865)
Kennedy
Barnett,
Morton
1899)
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De
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The trustee in bankruptcy intervened, and claimed that Eastin was indebted to Arnold at the time of the alleged and attempted transfer to him of the steamboat and barges in August, 1896, and that Eastin was then otherwise largely indebted, and was insolvent, and that, with the design to prefer Arnold to the exclusion of his other creditors, Eastin had transferred and conveyed the property in question, and that Arnold received the title to it with knowledge of Eastin's fraudulent purpose. The trustee claimed that on account of the above transactions, as well as of other acts of bankruptcy committed within four months of the filing of the petitions by the creditors, Eastin had become a bankrupt, had been so adjudged, and that the title to all of his property was vested in the trustee for the benefit of his creditors, and that the mortgage to Baskett and the bill of sale to Arnold, not having been lodged for record nor recorded within the time and the place prescribed by law, were void as to creditors. This suit, therefore, involves the title to the steamer Edgar and her barges, as well as the effect of appellant Baskett's mortgage upon the steamer and six of her barges, and of Arnold's lien upon the dock.

The circuit court adjudged Baskett's mortgage invalid. It also adjudged the sale to Arnold to be invalid, and decreed that Arnold deliver the boat and barges to the trustee, which was done. It also adjudged rents against Arnold for the use of the boat during the time that he had the possession of her after the appointment of the trustee in bankruptcy. But the court gave to Arnold a lien upon the dock at Evansville for the $735, and permitted, by judgment of the court, an amended pleading to be filed by Arnold, setting up the fact he had discharged liens upon the boat to the extent of about $1,200, for which she had been libeled in the United States District Court at Evansville by various claimants, as

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well as to set up certain expenses for repairs and insurance upon the boat while she was in his possession. Baskett appeals from the judgment disallowing his lien. Arnold appeals from the judgment denying his title. The trustee in bankruptcy has prosecuted a cross-appeal from so much of the judgment as allowed Arnold a lien upon the dock at Evansville as well as because it allowed him anything for the maritime liens, which it is alleged he has paid to procure the release of the boat.

By the United States Constitution exclusive cognizance is conferred upon the courts of the United States in all cases of admiralty and maritime jurisdiction. U. S. Const., art. 3, section 2; The Moses Taylor v. Harmons, 4 Wall., 411, 18 L. Ed., 397; The Steamboat Ad. Hine v. Trevor, 4 Wall., 555, 18 L. Ed., 451; The Belfast, 7 Wall., 624, 19 L. Ed., 266; Glass v. The Sloop Betsey, 3 Dall. 6, 1 L. Ed., 485. This jurisdiction, though formerly questioned, has ever since the case of The Genesee Chief, 12 How., 443, 13 L. Ed., 1058, been uniformly held to include not only tide waters, but to extend to all waters connecting with other States or countries, navigable by vessels used in commerce. As an incident of the federal control and jurisdiction, Congress has enacted statutes requiring the registration of United States vessels, as follows (see Rev. St. U. S., sections 4141, 4192 [U. S. Comp. St. 1901, pp. 2808, 2837]):

"Sec. 4141. Every vessel, except as hereinafter provided, shall be registered by the collector of that collection district, which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of such vessel, usually resides."

"Sec. 4192. No bill of sale, mortgage, hypothecation, or

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conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled. The lien by bottomry on any vessel, created during her voyage by a loan of money or materials necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section."

Under the facts admitted in this case, at the time of the various transfers affected by the decree herein the home port of the Edgar was at Evansville, Ind. Consequently any bill of sale transferring her title, or any mortgage creating a lien upon her, save by way of bottomry, was of necessity recordable in the office of the collector of customs at that port before it could affect others than the parties to such transfers and those having actual notice of it. The recording of the mortgage elsewhere was as ineffectual as if it had not been recorded at all, so far as constituting it constructive notice to creditors or purchasers was concerned. Therefore the recording of Baskett's mortgage in Henderson County Court clerk's office of Kentucky did not create a lien upon the boat as against the creditors of her owner, Eastin; nor, for obvious reasons, could the recording of the mortgage in the surveyor's office on April 1, 1901, affect antecedent creditors. It is claimed for Eastin, however, that the barges were not such vessels as were within the maritime jurisdiction of the United States courts, and, as at the time they were mortgaged to appellant Baskett, they were within Henderson county, the record of the mortgage in that county (the owner being a non-resident of this State) was effectual

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to create a lien thereon. Section 495, Kentucky Statutes, 1899. It was decided in the case of the General Cass, Brown, Adm., 334, that the true criterion by which to determine whether any water craft or vessel is subject to admiralty jurisdiction is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity, or means of propulsion.

Section 3 of the Revised Statutes of the United States (U. S. Comp. St., 1901, p. 4), in defining the word "vessel" as used in the statutes, says: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

In the following cases it has been held that a barge was such craft, and was included within the jurisdiction of the admiralty courts: Disbrow v. The Walsh Bros. (D. C.) 36 Fed., 607; Wood v. The Two Barges (C. C.) 46 Fed., 204; The Dick Keyes, 1 Biss., 408, Fed. Cas. No. 3,898; The City of Pittsburg (D. C.) 45 Fed., 699. Statutes requiring the registration of conveyances are for the purpose of giving notice to intending purchasers and creditors. The United States statute quoted supra has that purpose. Of such vessel moving from place to place, and through many jurisdictions, purchasers or creditors could have no other safe means of informing themselves upon these points. It could not be known with any certainty where they may have been in the course of their voyage, and, if it were competent to create a lien on them by mortgage at every point where they may have touched, inextricable confusion and opportunity for fraud would result. The federal statute is the only efficacious and practical method of dealing with the subject. The State courts can and will enforce liens upon property and rights

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thereto created by federal statutes as they could if created by State statutes, unless the federal statutes confer exclusive jurisdiction therefor upon the United States courts.

What has just been said concerning the recording of Baskett's mortgage applies with equal force to appellant Arnold's bill of sale and to his contracts for liens upon the barges built by him for Eastin and not paid for. But there are other questions affecting this transaction that should be decided. The record does not state the grounds upon which the circuit court based its judgment in denying appellant Arnold's title to the boat and barges, but the record does show the following facts: The debtor Eastin was hopelessly insolvent on August 20, 1900. For a long time prior thereto he had been indebted to Arnold for balances owing and past due upon barges built by Arnold and sold to Eastin. The steamer and the barges are shown to have been worth at the time of their transfer as much as $9,000 or more. Arnold bought them, it is claimed, for $3,038.22, of which $2,500 was paid in cash when the bill of sale was executed, and the remainder by the satisfaction of an indebtedness from Arnold to Eastin of $538.22. Upon the whole record we conclude that this sale was not made bona fide; that Eastin intended to give to his creditor Arnold a preference over his other creditors, knowing at the time that he was insolvent; that at the most the $2,500 was regarded by the parties as an advancement or loan, which was to be paid to Arnold if Eastin should weather his financial storm, or otherwise Arnold was to have the boat and barges at the inadequate price of $3,038.22. The badges of fraud in law are that Arnold, the creditor, had constructive notice, if not actual knowledge, of Eastin's unlawful design to prefer Arnold to his other creditors when both knew that Eastin was insolvent and failing. This is shown both by the grossly inadequate price

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paid for the boat and barges, and by the conduct of the parties in making the transfer, as well as by their subsequent conduct. The failure of the transferee, Arnold, to take possession of the property, but leaving it in the possession and control of his vendor, with apparent title and ownership; the leaving the boats and bill of sale, with insurance payable to Eastin as owner, indorsed to Arnold as his interest might appear, all in the possession and control of the vendor—show no delivery of the property. The purchase by a creditor from a failing debtor at a greatly inadequate price, which property the creditor did not need, and which he did not exercise any control over by way of using or hiring, as an ordinary business man would have done with his own, and his apparent indifference to the fact that the boats were for a time taken charge of by the State court receiver in proceedings against the debtor; that the putative purchaser failed to list the property for taxation when he gave his assessment list—all argue that the transaction was not a sale in good faith, and for a fair, adequate, consideration. His failure to testify fully and candidly, and his failure to remember most important facts material to his title, and of very recent occurrence, create a suspicion that justifies the solution of doubts against him. If we have been led into error in these conclusions, it was easily within the power of the parties most concerned to have prevented it by candidly stating all the facts connected with the transaction, which they did not do. So we find that the circuit court was justified in adjudging that nothing passed by the bill of sale to Eastin, and that the title to the boat and barges remained in him till the adjudication in bankruptcy; whereupon the trustee was vested with title to the bankrupt's property, including that transferred by him in fraud of his creditors.

Section 70a of the bankrupt law (Act July 1, 1898, c.

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541, 30 Stat., 565 [U. S. Comp. St., 1901, p. 3451]) is as follows: "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt from all . . . (4) Property transferred by him in fraud of his creditors."

Such conveyances may be attacked within four months, under section 67e of the bankrupt law (30 Stat., 564 [U. S. Comp. St., 1901, p. 3449]): "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, territory or district in which such property is situate,

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shall be deemed null and void under this act against the creditors of such debtor, if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Section 67e pertains to fraudulent transfers, without reference to a preference of creditors.

Section 60a, 30 Stat., 562 (U. S. Comp. St., 1901, p. 3445) defines a preference, and section 60b gives to a trustee the right to recover a preference when the person receiving it, or to be benefited thereby, shall have had reasonable cause to believe the transfer was intended as a preference. Those sections read as follows:

"Sec. 60a. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"(b) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition or before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Section 57g, 30 Stat., 560 (U. S. Comp. St., 1901, p. 3443) provides that "the claims of creditors who have received preferences, shall not be allowed unless such creditors shall surrender their preferences."

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Sections 67a, 67d, 30 Stat., 564 (U. S. Comp. St., 1901, p. 3449) are directed to liens bad for want of record, fraud, or other reasons, and are as follows:

"(a) Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

"(d) Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

Although the bill of sale was executed more than four months before the filing of the petitions in bankruptcy, the facts that it had not been recorded in the office required by statute to constitute it notice as against creditors, and that the vendor continued in the possession of the property, render the sale void as to creditors; and the registering of the bill within the four months brings the whole transaction within the purview of the legislation against acts of bankruptcy.

The facts show, as before stated, that the transfer was not only not in good faith, but that the consideration was so inadequate as to raise the presumption that the purchaser must have known of Eastin's purpose to defraud his creditors. The trustee in bankruptcy had come into the State court, and invoked its equitable jurisdiction to enable it to regain the possession of the bankrupt's property from one claimed to be not entitled to the possession. In our opinion, it would have been competent for the State court to have required the trustee, as a condition to its granting the relief sought, that the person in possession should be restored the money which he had paid out on the property to preserve it, or impose such other equitable terms as the court might have

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required from any other suitor under similar circumstances. And the court might have done this, although it was within the jurisdiction of the federal court to have allowed such relief in finally reckoning the liens and claims of creditors in the bankruptcy proceedings. For a court of chancery ought to do complete justice, or it should require it to be done by a litigant claiming its aid before acting on his behalf. In this case it is claimed that appellant Arnold paid about $1,200 that were liens against the boat, for which she had been libeled. These liens were superior to those of Eastin's general creditors. Their discharge by Arnold was a benefit to the bankrupt's estate to that extent. They must have been paid by the creditors, or by the assets, to-wit, the boat, before general creditors would have been entitled to anything. It is but just that Arnold should be reimbursed that sum, notwithstanding that he may not have acted in good faith towards the creditors in other particulars, and, as he had possession of the boat, the circuit court might have required that he be repaid this sum before it would compel him to deliver the boat to the trustees for the creditors. However, Arnold, upon the announcement of the court's judgment finding that he had not title to the boat, voluntarily surrendered her to the trustee in bankruptcy. It was not competent thereafter for the State court to undertake to audit claims against the bankrupt estate or any of its assets, and to adjudge their priorities. What it might have required as a condition to granting its equitable relief upon the petition of the trustee it did not do, nor does Arnold complain on this appeal of such failure. These claims are furthermore maritime liens, jurisdiction to enforce which is exclusively given to the federal courts, and while, as we have stated, the State court might have withheld its action in favor of the trustee unless he should make Arnold whole in

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this matter, it can not, after it has acted and adjudged the title to the trustee, and after Arnold has delivered the possession of the property to the trustee, and he has received it, proceed to adjudge independently upon matters that are beyond its jurisdiction.

As to the lien upon the dock at Evansville, whether or not it is a vessel, within the contemplation of the United States Statutes (The Old Natchez [D. C.] 9 Fed., 476; Cope v. Vallette Dry Dock [D. C.] 10 Fed., 142) the alleged contract for building material and means furnished to construct the dock are not matters within the maritime jurisdiction. People's Ferry Co. v. Beers, 20 How., 393, 15 L. Ed., 961; Edwards v. Elliott, 21 Wall., 532, 22 L. Ed., 487; Young v. The Ship Orpheus 2 Cliff., 29, Fed. Cas. No. 18,169. At that time the dock was but a chattel within the State of Indiana (Stinson v. Minor, 34 Ind., 89), though it appears now to be in the Ohio river, and within the jurisdiction of the courts of this State upon a proper case. The right of Arnold, under the alleged agreement for a lien upon the dock, must, however, be based upon the laws of Indiana, and not of this State, as his contract was made there while the property was within that jurisdiction. Burns' Rev. St. Ind., 1901, section 6638, provides: "No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged as provided in case of deeds of conveyance and recorded in the recorder's office of the county where the mortgagor resides within ten days after the execution thereof."

The Indiana Supreme Court, in considering similar contracts as affecting the rights of subsequent creditors, holds that, unless a mortgage is executed and recorded in strict

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accordance with the statute, it is not valid as against creditors. Granger v. Adams, 90 Ind., 87; Sidener v. Bible, 43 Ind., 230; Ames v. Warren, 76 Ind., 512, 40 Am. Rep., 258; Lockwood v. Slevin, 26 Ind., 124. In State v. Griffin, 16 Ind. App., 558, 45 N. E., 936, the court said: "The Supreme Court of this State has many times had occasion to apply the provisions of this section, and has uniformly held that a chattel mortgage, to be invalid as to persons not parties thereto, must be recorded in the county in which the mortgagor resides, and within ten days after its execution." In Seavey v. Walker, 108 Ind., 78, 9 N. E., 347, it was said: "The controlling question made at the trial was upon the nature, good faith, and validity of the alleged sale and transfer of the mortgaged property to Seavey and Morgan & Beach. . . . If the bill of sale in evidence in this case was in legal effect only a mortgage, as the circuit court may have concluded it was, then it was void for not having been recorded within ten days after its execution."

The trustee in bankruptcy peculiarly represents the creditors of the bankrupt, the alleged mortgagor. His claim is essentially on their behalf, and is an attack for them upon the claim of the specific creditor that he has a mortgage lien upon the property. The validity of the alleged mortgage as to such creditors does not depend alone upon its existence and due execution and a fair consideration. By the express terms of the statute, doubtless passed out of consideration of the necessity for the protection of commercial transactions made upon the faith of the debtor's apparent state of solvency, it must be recorded in the proper office of registry, where such creditors may be apprised of all claims or liens upon the debtor's property, so that they may, before they part with their goods, protect themselves, or advisedly take the risk of the credit. While, as between the debtor Eastin

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and the creditor Arnold, the transaction regarding the dock at Evansville and the barges sold by him might be enforceable, to allow the lien as against Eastin's other creditors, especially those who gave him credit without knowledge or notice of its existence, would be at war not only with the letter, but the purpose, of the statutes. The circuit court should not, under the statutes quoted, and under the decisions of the Supreme Court of Indiana, have imposed the condition of the payment of the $735 alleged lien before adjudging the possession of the dock to the trustee.

We conclude that the judgment of the circuit court denying the lien to appellant Baskett must be affirmed, and the judgment upon the cross-appeal of the trustee, in so far as barges named in the judgment must be affirmed. But the judgment denying the title of Arnold to the steamer and it allows or directs the allowance of claims to Arnold, must be reversed. To the extent that it is reversed the cause is remanded for proceedings consistent herewith.

Petition for rehearing by appellant Arnold overruled.

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CASE 77—SEPARATE ACTIONS BY THE COMMONWEALTH AND BY THE CITY OF LOUISVILLE AGAINST THE YOUNG MEN'S CHRISTIAN ASSOCIATION TO RECOVER TAXES ON PROPERTY OWNED BY SAID ASSOCIATION.—NOV. 12.

116 711
125 335

Commonwealth v. Young Men's Christian Association.

APPEAL FROM DAVIESS CIRCUIT COURT.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

FROM JUDGMENTS FOR DEFENDANTS IN EACH CASE PLAINTIFFS APPEAL. AFFIRMED.

TAXATION—EXEMPTION—PLACE USED FOR RELIGIOUS WORSHIP—INSTITUTION OF PURELY PUBLIC CHARITY.

Held: 1. A Young Men's Christian Association, organized to endeavor to bring young men under moral and religious influences, and holding meetings every Sunday afternoon in a building owned by the association, where a service was had, hymns were sung, and the Scriptures were read and expounded, actually used its building for religious worship, within the meaning of Constitution, section 170, exempting property so used from taxation.

2. A Young Men's Christian Association, organized to endeavor to bring young men under moral and religious influences, to aid them in selecting suitable boarding places and securing employment, and by other means to surround them with Christian influences, and actually engaging in such work, and also furnishing instruction, keeping open libraries, gymnasiums, lists of boarding houses, etc., and membership in which is nontransferable, giving no property right—the membership fee being merely nominal—is an institution of purely public charity, within Constitution, section 170, exempting property of such institutions from taxation.

H. L. STONE AND J. B. CLARK, ATTORNEYS FOR APPELLANTS.

The only question which the pleadings raise for the determination of the court is whether appellee's property, or either parcel

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thereof, is exempt from taxation under the provisions of the Constitution, and the statute enacted in pursuance thereof.

The appellee's contention is that it is exempt from taxation on three separate and distinct grounds: (1) Because it is a place actually used for religious worship; (2) because it is an institution of education not used or employed for gain, &c., and (3) because it is an institution of purely public charity.

1. Is it exempt for religious uses? The language of the Constitution is:

"There shall be exempt from taxation . . . places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities and towns. . . .

The language of the response pertinent is:

"Since the association has occupied its present building above mentioned, said services (religious) have been conducted usually in a large room known as the chapel on the second floor . . . but said services have lately been held, and during the summer months of the year will perhaps generally be held, in the room situated in the basement of said building, and occupying the whole of the northeast part of the building, and known as the "gymnasium."

I wish to draw the court's attention sharply to two points: (1) The response does not say that it was so used on the 15th day of September of the years mentioned in the statement. It does not claim that it had two rooms in use at the same time for religious purposes, and the 15th day of September fixes the liability of the room that was not in use; and (2) it does not show that the same room, for instance the gymnasium, is not concurrently used for other than religious purposes, and construing against the pleader we assume that other uses were made of the rooms in which religious devotions were conducted. We submit, therefore, that the response does not bring a single room within the exception.

Certainly no other room than that used for religious purposes would be exempt, for it is the use and not the ownership that determines.

It makes no difference whether business rooms or business houses are built on the same half-acre lot under different roofs, or under the same roof. Although the store rooms and gymnasium and school rooms belong to the defendant, and are even under the same roof as the room in which they hold religious services, yet when they have a different use they are liable for taxation. We think that the exception in the Constitution refers to churches only, certainly not to sewing machine stores,

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dry goods stores, &c., which can not be said to be appurtenant to a house of religious worship. At most, the defendant would have to value the room in which the religious worship was conducted, and have that much of its property exempted.

2. Is the appellee an institution of purelly public charity?

We submit that the evidence shows (1) that the payroll of the officers and employes of appellee approximate $590 a month; (2) the total receipts of the institution for the year ending June 30, 1900, were $21,361.12; (3) the lockers in the gymnasium are rented to the *members*, for which they pay extra $1 per year; (4) the towels are charged for extra also to the *members;* (5) none of the privileges of the gymnasium are open *gratuitously* to the public at large; (6) the privileges of the barber shop are open to the public and those who patronize it must *pay* for the service rendered.

From this statement of facts it is impossible to reach the conclusion that the appellee is an institution of *purely* or *wholly public charity.*

AUTHORITIES CITED.

Trustees of Ky. Female Orphans' School v. City of Louisville, 100 Ky., 470; City of Newport v. Masonic Temple Assn., 21 R., 1785; Young Men's Protestant Temperance and Benevolent Assn. v. Fall River, 160 Mass., 409; Young Men's Christian Assn. v. Paterson, 61 N. J. L., 420; Auburn v. Young Men's Christian Assn., 86 Me., 244; Philadelphia v. Masonic Home of Philadelphia, 160 Pa., 572; Barbee v. City of Dallas, 64 S. W., 1018; Book Agents of the Methodist Episcopal Church v. Hinton, 21 S. W., 321; Bosworth, Sheriff, v. Chautauqua Assembly, 65 S. W., 602; Broadway Christian Church v. Commonwealth, Trustees of Broadway Christian Church v. Gross, 66 S. W., 32; Widows' and Orphans' Home of Odd Fellows of Kentucky v. Bosworth, Sheriff, 70 S. W., 280.

HELM & BRUCE, ATTORNEYS FOR APPELLEE.

AUTHORITIES CITED.

1. The exemption from taxation of public property and the property of churches, schools and other institutions devoted exclusively to the public good is not the exception but the rule; and statutes to this effect ought to receive a fair and reasonable construction. Yale University v. New Haven, 71 Conn., 316, 42 Alt. Rep., 87, 92; State v. Collector of Jersey City, 24 N. J. L.,

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108, 120; Association for Colored Orphans v. Mayor of N. Y., 104 N. Y., 581, 586, 12 N. E. R., 279, 281.

2. The Young Men's Christian Association is an "institution of purely public charity." Trustees of Ky. Female Orphan School v. City of Louisville, 100 Ky., 470; City of Louisville v. Board of Nazareth, &c., 100 Ky., 518; Gerke v. Purcell, 25 Ohio St., 240; Episcopal Academy v. Philadelphia, 150 Pa. St., 565; Philadelphia v. Women's Christian Association, 125 Pa. St., 579.

3. Contemporaneous construction. Clark's Run Turnpike Co. v. Com., 96 Ky., 525.

4. Authorities explained. City of Newport v. Masonic Temple Assn., 21 Ky. Law Rep., 1785; Odd Fellows v. Bosworth, 23 Ky. Law Rep., 1505; Com. v. Lexington Cemetery, 24 Ky. Law Rep., 924; Gray St. Infirmary v. City of Louisville, 23 Ky. Law Rep., 1274; Auburn v. Y. M. C. A., 86 Me., 244, 29 Atl. Rep., 992; State v. Patterson, 61 N. J. L., 420, 39 Atl. Rep., 655;

HAYES & WELLS, ATTORNEYS FOR APPELLEE.

SYNOPSIS AND LIST OF AUTHORITIES.

1. The building of appellee is "a place actually used for religious worship." Const. of Ky., sec. 170; Opinion of Judge Sterling B. Toney in City of Louisville v. Y. M. C. A.

2. The appellee is in an important sense an institution of education. Bosworth, Sheriff, v. Ky. Chautauqua Assembly, 23 R., 1393.

3. Appellee is an institution of purely public charity.

(1) Definitions of purely public charities. Trustees of Ky. Female Orphan School v. City of Louisville, 100 Ky., 470; Am. & Eng. Ency. of Law, 2d ed., vol. 5, p. 894; Ibid., p. 897; Vidal v. Girard, 2 How. (U. S.), 127; Ford, &c., v. Ford's Ex'r, 91 Ky., 572.

(2) The facts of this case show clearly that appellee comes within the approved definitions of a purely public charity.

(3) The charges made by appellee do not deprive it of this character. Philadelphia v. Women's Christian Assn., 125 Pa. St., 572.

(4) Appellee's membership regulation does not destroy its character as a purely public charity. Donnahugh's Appeal, 86 Pa. St., 306.

(5) Appellee contrasted with mutual benefit associations. City of Newport v. Masonic Temple Assn., 21 R., 1785.

(6) The property of appellee does not belong to the so-called members, and would not go to them upon a dissolution of the

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association, and the public has the right (which would be protected by the courts) to have the charity properly applied. Ky. Stats., sec. 323; Ency. Pl. & Pr., vol. 22, pp. 204 and 205; Chambers v. Baptist Educational Society, 1 B. Mon., 215; Bap. Church v. Presbyterian Church, 18 B. Mon., 635; Fitterer v. Crawford, 50 L. R. A., 191.

(7) All of appellee's property is exempt. Trustees of Ky. Female Orphan School v. City of Louisville, *supra;* Methodist Episcopal Church South v. Hinton (Tenn.), 19 L. R. A., 289.

(8) It would be competent to support by taxation such an institution as the appellee.

(9) The cases following the leading case in Kentucky strengthen our contention. City of Louisville v. Nazareth Literary and Benevolent Institution and other cases heard with it, 100 Ky., 518.

(10) In other States the Young Men's Christian Association is regarded as a charitable institution. American Sunday-school Union v. Taylor, 161 Pa., 307, 23 L. R. A., 695; Y. M. C. A. of Omaha v. Douglass County, 60 Neb., 642, 52 L. R. A., 123; City of Auburn v. Y. M. C. A., 29 Atl., 992; State v. Patterson, 39 Atl., 655, distinguished.

(11) The rule that exemptions from taxation are strictly construed is not applicable to this case. Trustees Female Orphan School v. City of Louisville, *supra;* 12 Am. & Eng. Ency. of Law, 2d ed., 306; Yale University v. New Haven, 71 Conn., 316, 43 L. R. A., 490.

JNO. C. STROTHER, ATTORNEY FOR APPELLEE.

POINTS AND AUTHORITIES.

1. The preamble to the act incorporating appellee shows the religious, moral and intellectual purposes and gives character to the entire act of incorporation. Sutherland on Statutory Construction, secs. 212-213-247.

2. Contemporary construction and official usage for a long period by the persons charged with the administration of a law are among the legitimate aids in the interpretation of statutes. Sutherland on Statutory Construction, sec. 309. Cases criticized and explained: City of Newport v. Masonic Temple Co., 21 R., 1785; Morningstar v. Hazelip, 23 Ohio St., 144; Philadelphia v. Masonic Home, 160 Pa., 752; Delaware County Institute v. Delaware County, 94 Pa.; Bangor v. Masonic Lodge, 73 Me., 428; Babb v. Reed, 28 Am. Dec., 650; Young Men's Pro. Ben. Soc. v. Fall River, 160 Mass., 409; State v. Patterson, 39 Atl., 655; Auburn v. Y. M. C. A., 29 Atl., 992.

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3. Appellee is an institution of purely public charity and is exempt as such an institution from taxation on all of its property.

4. It is an institution of education not used or employed for gain by any person or corporation.

5. Appellee's property and ground is a place actually used for religious worship and upon any and all of these grounds is exempt from taxation. Gerke v. Purcell, 25 Ohio St., 229, 120 Mass., 432; Episcopal Academy v. Philadelphia, 150 Pa. St., 565; Donohugh's Appeal, 86 Pa. St., 312; Boyd v. Fire Ins. Patrol, 120 Pa. St., 624; Philadelphia v. Women's Christion Assn., 125 Pa. St., 572; Bird Orphan Asylum v. School District, 90 Pa. St., 21; Methodist Episcopal Church South v. Hinton, 92 Tenn., 188; State v. Fisk University, 3 Pick., 333; Trustees Ky. Female Orphan School v. Louisville, 100 Ky., 470; Louisville v. Board of Nazareth, &c., 100 Ky., 518.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

These two appeals involve a common question, namely, the liability of the property of appellee to taxation. In each case the appellee owns a large and valuable building, used in part for other purposes than directly by the association. Rooms in the buildings are rented to raise revenue to help to maintain the institutions. A considerable part of the buildings are constantly used by the associations for their meetings and other work. In each case, also, the appellee owns a vacant lot and other property, pending its sale. The lots were taken in payment of donations to the institutions. Appellee's claim of non-liability to taxation depends upon the character of the institutions.

All property must share in bearing the burden of government, except such as by the Constitution is expressly exempt. Section 170 of that instrument is as follows: "There shall be exempt from taxation public property used for public purposes, places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities

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or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto." Appellees claim to come within the classes of exempted objects above named, on three grounds: (1) That their buildings are places actually used for religious worship, and do not exceed one-half acre of ground; (2) that they are institutions of purely public charity; and (3) that they are institutions of education, not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education. The circuit courts of Daviess and Jefferson counties each sustained the claims of exemption.

The act of Legislature granting the charter to appellee, the Louisville Association, approved April 3, 1878 (2 Acts 1878, p. 280, c. 744) states the purposes of the association thus: "Whereas, certain persons have associated themselves together as a Young Men's Christian Association, for the promotion of religion, morality, and intellectual and social improvement; for the better promotion of these ends desire a charter of incorporation, therefore, be it enacted," etc.

The constitution adopted by the association, in which is set forth its purposes, declares:

"Section 1. It shall be the object of the association to seek

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out young men and endeavor to bring them under moral and religious influences; to secure their attendance at some place of worship; to introduce them to the members and privileges of this association; to aid them in selecting suitable boarding places and employment, and by every possible means to surround them with Christian influences.

"Sec. 2. Members shall exert themselves to interest the churches to which they may belong in the object and welfare of the association, and use all proper means to increase its usefulness."

The objects and purposes of the Owensboro Association are substantially the same.

So much for the apparent nature of the association. Actually, on every Sunday afternoon there is held in their buildings a religious service for the worship of God. As a witness describes these, they are "much like preaching service, though not so formal." There are singing of hymns, reading of Scriptures, and expounding of the same, prayer, and generally an invitation and exhortation to lead a Christian life. In addition to these religious Sunday services, which may be said to correspond with the preaching services of the churches, there are regularly taught Bible classes in the association buildings, which classes correspond very nearly to the Sunday school work done by the churches. Other religious studies are also conducted. All of these services are strictly religious services, and are actually held in the association buildings. In addition to these, other work of a religious nature is done by the association outside of the building. Its religious work is its main work. Its secretary receives a salary. He is the only one of the association who receives any money compensation from it. His duties are quite similar to those of a pastor of a church.

There was nothing, perhaps, in all that moved the settlement of this country and the establishment of its forms of

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government, more dominant than the religious idea. From the earliest settlements, through every form of social compact, and by universal consent, ingrafted now either upon the Constitutions of the States or upon their statutes, is the idea that the public well-being justifies the most liberal encouragement of religious teachings and practices; and to that end, always, buildings used for religious worship have been exempted from taxation. Religious societies are deemed to be public benefactors. Their teachings and moral discipline among their members are probably of as much value to society, in keeping the peace and preserving the rights of property, as the most elaborate and expensive police system without such influences. Hence they are regarded with favor. No one church or sect is regarded by the law as above any other. Nor does the manner of worship or the method of teaching or the creed affect this public policy. It is therefore not material that the institution claiming the benefit of the constitutional exemption is without an ordained preacher, or that its methods involve a departure from the customary modes of worship. If the worship is religious, commending itself to the consciences of its votaries, it is within the pale of the law's favor. We have no hesitancy in declaring that appellees, in the use of their buildings as places actually used for religious worship, are exempted from taxation thereon, as being clearly within the letter and intent of section 170 of our Constitution. But if the society owns other property, not actually used as a place for religious worship, or if it owns property so used, but in excess of the quantity exempted by that clause of the Constitution which has been quoted, or if some part of its buildings is used distinctly for other purposes, such excess would be liable to taxation as other property, without regard to its ownership, unless by some other provision of the Constitution it

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was exempt, which brings us to consider appellees' claim that they are institutions of purely public charity.

Charity, in its broad sense, should abound in every institution; tempering even the rigor of the law, and meliorating the harsh conditions of life. It is announced by Divine authority and regarded by the common consent of all enlightened people as being the chief of human virtues. When property is employed in its unselfish exercise on behalf of the public, where it eases the burdens of society, and in a measure thereby discharges a duty which the public, on its conscience, owes to unfortunate humanity, and is unrestricted save by the limitation of ability, the charity may be said to be a purely public one. "Public charities are public blessings, and the Commonwealth is interested in giving force and effect to them," this court declared in Chambers v. Baptist Educational Society, 1 B. Mon., 215. Aside from that part of the religious work done by appellees, which may be denominated devotional, they undertake to bring within the religious, moral, and intellectual influences of the institution all young men, and, for that matter, old men, too, for the betterment, improvement, and protection from evil influences and consequences. It is not so much the giving of alms, or in aid of the mendicant. The endeavor is to reach the boys and young men before they need alms, and before they are reduced to beggary, and, by training the minds, and teaching them how to use and preserve their bodies, and how to live useful and honest lives, to save them from the lower grades of misfortune, so familiar in the utter helplessness of abject poverty and disease and want. This is accomplished by the institution's keeping open attractive quarters, where libraries of useful books, current magazines, and newspapers, innocent games of amusement, a gymnasium for the exercise and development of the body, and night schools, affording

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additional opportunities to such as have not had sufficient advantages in education, are all accessible to whomsoever will avail himself of them, without regard to creed or nationality. Lists of decent boarding houses are kept, to which strangers are directed. Proper acquaintances and associations are formed, and useful and moral instruction imparted. In other words, they help the helpless, would keep the innocent innocent, and endeavor by placing clean ideals and experiences before the youth to have them adopt them in their lives. They aid the uneducated to a limited but practical education. This is all done "for the love of God and for the love of our neighbor, in the catholic and universal sense, free from the stain of anything that is personal, private, or selfish;" and it is, therefore, as said by this court in Ford v. Ford's Ex'r., 91 Ky., 576, 13 R., 183, 16 S. W., 451, a charity.

But it is argued that however benevolent the purposes and work of these institutions, they are limited to their own members, and consequently come under the head of private, instead of public, charities. The institutions have memberships, for which a nominal fee is exacted. Many, if not most, of their privileges, are restricted to their own members. But the members have no property right, or at most but a qualified and temporary one, in the buildings or funds of the associations. They receive no profits or dividends. Certificates of membership are not transferable, and have no money value. The relation of the members is similar to that of members of churches—a membership entailing a pecuniary obligation and probably an insignia of worthiness and good standing for the time being. The fund by which the lots were acquired and the buildings erected and furnished was, in the main, contributed by charitably disposed persons, who

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have absolutely no pecuniary interest in or control of the institutions. They are donated for the perpetual enjoyment of all who shall avail themselves of the privileges. The part contributed by membership fees is by far the smaller part of the means necessary to maintain the association's work. Any man or youth of acceptable moral standing is eligible for membership. Many of the privileges of the institutions are, however, absolutely free to all the public. But the fact that some part of the expense in maintaining the institutions is required to be paid by those who enjoy all its privileges does not change its character as a public charity. It was held by this court in Trustees of Kentucky Female Orphan School v. City of Louisville, 100 Ky., 470, 19 R., 1916, 36 S. W., 921, 40 L. R. A., 119, that the fact that a small stipend was exacted from some of those who were benefited by the school did not detract from its character as an institution of purely public charity. That regulation merely made the charity partly self-sustaining. It was also held in that case, and the cases decided at the same time, that the fact that only a limited number of the public were benefited, on their selection by sectarian trustees, did not deprive it of its characteristics as a purely public charity. It is plain that the framers of the Constitution could not have meant that only those institutions should be included in their exemption which were freely open to all the public, for there are none such. Discipline, order, regulation, and selection are necessary in dispensing such charities; and requirements not unreasonable in these particulars, although they limit, as of necessity they must, the number to be benefited to the accommodation of the means at hand, are not at all incompatible with the general character of such institutions.

As the institutions are ones of purely public charity—which includes its educational features, not separately considered

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for that reason—all their property is exempt from taxation. For, as said by the court in the course of the opinion in Trustees Kentucky Female Orphan School v. City of Louisville, supra: "Upon the whole, it would seem that when the statute exempts the 'institution' from taxation, and no qualifying words are used showing or tending to show that only the property 'used' by the institution, or 'connected' with the institution, is to be exempt, then the associated entity—the corporate being—with its estate as an entirety, is embraced by the word 'institution.'" The cases of Newport v. Masonic Temple Association, 108 Ky., 333, 21 R., 1785, 56 S. W., 405, 49 L. R. A., 252, Widows' and Orphans' Home of the Odd Fellows of Kentucky v. Bosworth, Sheriff, 112 Ky., 200, 23 R., 1505, 65 S. W., 591, and Commonwealth v. Lexington Cemetery Co., 114 Ky., 165, 24 R., 924, 70 S. W., 280, are cited by appellants as indicating a different construction from that here given section 170 of the Constitution. In addition to the fact that those cases do not purport to overrule the comparatively recent and thoroughly considered case of Trustees of Kentucky Female Orphan School v. City of Louisville, supra, and were therefore not considered by the court as being in conflict therewith, there is this distinction between them, on the one side, and the Orphan School case and these cases, on the other: The Masonic Temple case and the Odd Fellows Widows, and Orphans' Home case were each private charities, pure and simple, and so held by the court, because they were exclusively for the benefit of certain designated beneficiaries—those dependent upon the creators of the charities, or for the benefit of the persons claiming the exemption, as in the case of the Masons. They were held to have certain secret rites, ceremonies, and distinctions, which might be deemed to have a peculiar value. At least, they were intended to, and did, exclude all the

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public but themselves from their enjoyment. They owned their property, and used it exclusively for their own personal enjoyment and entertainment, as a social club or other similar association might. Their charitable contributions were more in the nature of a mutual insurance or protective arrangement by which they insured themselves, or the dependent members of their families, against want in certain contingencies. Their charitable work, if any, outside of that bestowed on themselves and their own families, was incidental only, and not the objective purpose of the institutions. The Cemetery Company case was decided upon the express language of the Constitution, which exempted only the places of burial or graveyards, and not investments devoted to the maintenance of burial places. Two cases from other courts denying the exemption to Young Men's Christian Associations have been cited by counsel for appellants, viz.: Auburn v. Y. M. C. A., 29 Atl., 992 (a Maine case); and the other (a New Jersey case) State v. Paterson, 39 Atl., 655. The first of these cases was made to turn upon the peculiar phraseology of the Maine statute (Laws 1889, p. 242, c. 274) to-wit: "Except that so much of the real estate of such corporations as is not occupied by them for their own purposes, shall be taxed in the municipality in which it is situated." All that part of the associations' buildings actually occupied by them was held to be exempt. The New Jersey case discusses only the "charitable feature" of the question. It held that the word "charity," in their statute (3 Gen. St., p. 3320), was not used in its broad sense, but, on the contrary, was solely in the sense of "aid to the needy." This construction of the word is not in harmony with that uniformly placed upon it by this court.

The judgments of the circuit courts are each affirmed.

Chief Justice Burnam dissents.

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CASE 78—ACTION BY HERMAN J. HERZOG AGAINST THE CITY OF COVINGTON TO PREVENT IT FROM REQUIRING HIM TO PAY A LICENSE TAX AS REAL ESTATE AGENT IN SAID CITY.—NOV. 12.

City of Covington v. Herzog.

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122 612

APPEAL FROM KENTON CIRCUIT COURT.

FROM A JUDGMENT OVERRULING ITS DEMURRER TO THE PETITION DEFENDANT APPEALS. REVERSED.

LICENSE TAX—REAL ESTATE AGENT—ORDINANCE—CONSTITUTIONALITY—PLEADING—CONCLUSIONS OF LAW.

Held: 1. An allegation that a license tax of $25 on real estate agents is unequal, unjust, and disproportionate to that on other occupations, without the recital of any facts to support it, is a mere conclusion of law.

2. Constitution, section 174, provides that all property shall be taxed in proportion to its value, and that nothing in the Constitution shall be construed to prevent the General Assembly from providing for taxation based on license. Section 181 provides that the General Assembly may delegate the power to cities to impose license fees on trades, occupations, and professions. HELD, That Kentucky Statutes, 1899, section 3058, authorizing cities of the second class to a levy tax on "real estate agents and brokers, financial agents and brokers, house agents, rental agents, loan and brokerage companies," and a city ordinance levying a license tax of $25 on real estate agents, so defined as to include all these classes, are not unconstitutional, though several occupations are grouped under one head.

F. J. HANLON, ATTORNEY FOR APPELLANT.

The constitutionality of the following ordinance is involved in this case:

"Each and every person or firm engaged in the capacity of, or following the business of, real estate shall pay a license annually of $25. By a real estate dealer or agent (for the purpost of this section), is meant each and every person, or firm, who buys or sells real estate, either at auction or private sale for a commission, or who loans money on real estate, rents houses or collects rents therefrom, or sells mortgage or lien notes for com-

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mission, shall be considered as engaged in the real estate business, and a such must pay the license herein prescribed."

"Any peron, firm or corporation violating any of the provisions of this ordinance shall, upon conviction in the police court in the city of Covington, be fined in any sum not less than $10 or more tha $50, and the costs of prosecution."

Section 181 of the present Constitution of Kentucky provides in part as follows, to-wit:

"The General Assembly may, by general law only, provide for the payent of license fees on franchises, stock used for breeding purposes, and the various trades, occupations and professions, or a special or excise tax; and may by general laws delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades occupations and professions."

The General Assembly pursuant to this authority, granted by the Constitution of the State, did, by an act of March 19, 1894, grant and empower cities of the scond class to levy a license tax upon all real estate agents, as will be found under section 3058, Revised Statutes, subsection 2, which provides, in part, as follows:

"The general council shall have power by ordinance to license, tax and regulate undertakers, auctioneers, real estate agents and brokers, financial agents and brokers, commission merchants, house agents, lightning-rod agents, rental agents, etc."

Subsection 23 of section 3058 provides as follows:

"The general council shall have power by ordinance to impose, enforce and collect fines, forfeitures and penalties for the breach of any provision of this act or any ordinance; to punish the violation of any provision of this act or any ordinance of this city by fine or imprisonment, or by both fine and imprisonment; and no ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense."

The court will observe that the amended ordinance of April 25, 1901, provides:

"That each and every person or firm engaged in the capacity of, or following the business of, real estate agents, shall pay a license annually of $25."

It is respectfully submitted that the license in question requiring "each and every person or firm engaged in the capacity of, or following the business of real estate agent shall pay a license annually of $25," is constitutional and valid, and is a reasonable exercise of the power granted under the charter to

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cities of the second class. The license is upon all real estate agents, and the ordinance defines specifically who a real estate agent is, and the nature of his business. The license is not oppressive, but on the contrary is reasonable and fair.

AUTHORITIES CITED.

City of Covington v. Woods, 98 Ky., 344; Elliott v. City of Louisville, 19 Ky. Law Rep., 414; Bullitt v. City of Paducah, 8 Ky. Law Rep., 870; Levi v. City of Louisville, 97 Ky., 394; Hall v. Commonwealth, 19 Ky. Law Rep., 578; Bowser, &c., v. Thompson, 20 Rep., 31; Wilson & Bro. v. City of Lexington, 20 Rep., 1593; Fidelity Casualty Co. v. City of Louisville, 20 Ky. Law Rep., 1785; Baker v. City of Lexington, 21 Ky. Law Rep., 809; 1 Dillon, p. 410, &c.; see 338-341; Ky. Stats., sec. 3058, subsec. 23; Const., sec. 161; Ky. Stats., sec. 3058, subsec. 2.

MYERS & SOWARDS, ATTORNEYS FOR APPELLEE.

The amended petition recites more fully and clearly the basis of the action. From its reading it will be seen that appellee's contention is threefold:

(1) That the amount of the tax levied is oppressive, unequal, unjust and disproportionate to those borne by tradesmen and professional men generally within the city of Covington, and is disproportionate and unequal to the license or occupation taxes levied generally in said ordinance by the city of Covington, and is an unauthorized taking of private property for public use.

(2) That the license ordinance in question and subsection 2 of section 3058 of the Kentucky Statutes, the same being a provision of charters of cities of the second class, are invalid and void because they and each of them have divided and subdivided appellee's occupation into six occupations, said section 3058 authorizing said divisions and subdivisions and said ordinance levying a license tax for each of said divisions and subdivisions or limiting appellee to the following of one-sixth of his occupation in consideration of the payment of the one license fee.

(3) That the city has no right to fine or imprison appellee for a failure to pay a license or occupation tax.

A municipal corporation has no power or right to do anything other than what it is expressly given the right to do under its charter. The charter of a municipal corporation is a delegation of powers to its governing authority by the legislative branch of the government, and no powers will be presumed to have been

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granted that are not mentioned or not necessarily included in a general grant of power. This is particularly true of its right to tax.

The charter of appellant very fully states the procedure necessary to assess, levy and collect ad valorem taxes, but is silent as to the manner of the collection of license or occupation taxes and its right to proceed by arrest and fine is an implied one. It is our contention that least the same degree of care and exactness is required of the governing authority in levying, assessing and collecting license or occupation taxes that is required in assessing, levying and collecting ad valorem taxes. One is as much a tax as the other.

AUTHORITIES CITED.

Elliott v. City of Louisville, 19 R., 415; Simrall v. City of Covington, 90 Ky., 444; 1 Dillon on Mun. Corp., sec. 322; Mayor of Mobile v. Yuille, 3 Ala., 137; Robinson v. Mayor of Franklin, 1 Hump., 156; Anderson v. City of Wellington, 40 Kan., 173; Ex parte Frank, 52 Cal., 606; Mayor, &c., of Nashville v. Althrop, 5 Cold., 554; Cooley on Taxation, pp. 437, 570; Am. & Eng. Ency. of Law, vol. 25, p. 311; St. Louis v. Green, 7 Mo. App., 468; Marshall v. Wadsworth, 64 N. H., 386; St. Louis v. Sternberg, 4 Mo. App., 453; Shaw v. Pickett, 26 Vt., 482.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

The appellant, the city of Covington, appeals from a judgment of the Kenton Circuit Court overruling its general demurrer to the petition of appellee, and the entry of a judgment prohibiting the city from prosecuting appellee for conducting a real estate business without license as required by ordinance. The petition of appellee alleges "that he has for many years been employed as the agent of other persons in buying, selling, and renting real estate, and in buying and selling mortgage and other real estate lien notes;" that the city of Covington on the 25th of April, 1901, passed an ordinance relating to the licensing of various lines of business; that section 4 of the ordinance provides: "Real Estate. Each

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and every person or firm, engaged in the capacity of or following the business of real estate agents shall pay a license annually of $25.00. By real estate agent for the purpose of this section is meant each and every person or firm, who buys or sells real estate, either at auction or private sale, for a commission; or who loans money on real estate, rents houses and collects rents therefrom, or sells mortgage or lien notes for commission shall be considered as engaged in the real estate business, and as such must pay the license as herein prescribed." That this ordinance and section 3058 of the Kentucky Statutes of 1899, which is a provision of charters of cities of the second class, were both unconstitutional and void in so far as they authorize the levy of a license tax on real estate agents, because they subdivide the business into six distinct occupations, namely, "real estate agents and brokers," "financial agents and brokers," "house rental agents," "loan and brokerage companies;" that under the statute and ordinance the city had the right to levy a license tax on persons pursuing any one of these various occupations, which were in reality the same business; and that the license tax of $25.00 was oppressive, unequal, unjust, and disproportionate to those borne by tradesmen and professional men generally within the city of Covington and disproportionate and unequal to the license or occupation taxes levied generally by the ordinance.

Section 174 of the Constitution provides that "all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by the Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, license, or franchises." Section 181 of the Constitution pro-

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vides that "the General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions." In pursuance to these provisions of the Constitution, the General Assembly, in the charter of cities of the second class, provides that the general council of such a city shall have power by ordinance to tax and regulate every known kind of occupation and pursuit, including auctioneers, real estate agents and brokers, financial agents and brokers, rental agents, etc., and the ordinance in this case conforms substantially to the provisions of section 3058 of the Kentucky Statutes of 1899. While appellee alleges that the license tax of $25.00 is unequal, unjust, and disproportionate to that levied upon other similar occupations, no facts are cited to support the averment, and the allegation, as it stands, is nothing more than a conclusion of law. While there is a general similarity in each of the various occupations grouped in the ordinance under the head of dealers in real estate, and the same person might well engage in all of them at the same time, yet they are by no means identical, and either of them might furnish sufficient employment to occupy the entire time of a person, firm, or corporation. We see no ground for complaint on the part of appellee because the ordinance has grouped all of these separate occupations under a single head, and levied a single tax, as though they only constitute one occupation. If the city had seen fit to separate each of these occupations into separate heads, and required the payment of a license tax for the prosecution of each one of them, appellant would have had better grounds for complaint. We

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have had similar contentions before us as to the constitutionality of this provision of appellant's charter, which also appears in the charters of cities of the first, third, and fourth classes, in the cases of Commonwealth v. Laundry Companies, 105 Ky., 259, 20 R., 1172, 49 S. W., 26; City of Covington v. Woods, 98 Ky., 344, 17 R., 927, 33 S. W., 84; and Crosdale v. City of Cynthiana, 21 R., 36, 50 S. W., 977. In all of these cases the constitutionality of the statute and the ordinances pursuant thereto were upheld. The mere averment of the petition that the tax is oppressive and unequal is not sufficient averment of facts to support a cause of action.

For reasons indicated, the judgment is reversed, and the cause remanded, with instructions to sustain the demurrer filed by the city, and for other proceedings consistent herewith.

Petition for rehearing by appellee overruled.

CASE 79—ACTION BY M. A. STEMBRIDGE'S ADMR. AGAINST J. B. MCDONALD AND OTHERS TO ENFORE A JUDGMENT.—NOV. 13.

McDonald, &c., v. Stembridge's Admr.

APPEAL FROM HENDERSON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANTS APPEAL. AFFIRMED.

JUDGMENTS—EXECUTION—SUSPENDING STATUTE OF LIMITATIONS.

Held: An execution issued in the name of a foreign administrator on a judgment rendered in favor of the decedent suspends the running of the limitations fixed by Kentucky Statutes, 1899, section 2514, providing that an action on a judgment shall be commenced within fifteen years from the date of the last execution, though the administrator failed to give the bond required by Civil Code Practice., section 404, requiring a foreign administrator to give a bond conditioned on his disposing according to law of any property received on the execution.

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MONTGOMERY MERRITT, ATTORNEY FOR APPELLANT.

1. Does issuing execution by the clerk without requiring the nonresident administrator to execute the bond mentioned in section 404 of Civil Code stop the running of the statute of limitations? Williams v. Staton, 4 R., 226; Jones v. Martin, 5 R., 227; Mulholland v. Troutman's Admr., 10 R., 264; Morgan, &c., v. Winn's Admr., 17 B. M., 241; Marritt v. Babb, Exr., 91 Ky., 93; Haskins v. Helm, 4 Litt., 309; Adams v. Settle, 2 Duv., 76; Mainer v. Lindsay, 3 Bush, 94; Chapman v. Dyatt, 25 A. D., 600; Miller v. Anderson, Litt. S. C., 170, 11 Bush, 48.

M. C. & G. D. GIVENS, ATTORNEYS FOR APPELLEE.

POINTS DISCUSSED AND AUTHORITIES CITED.

1. Under Civil Code, section 402, upon the death of the plaintiff after judgment, execution shall issue in the name of his personal representative, and the clerk shall endorse on the execution the name of the plaintiff, his death and the name of the personal representative. Section 404, which provides that the clerk, before making such endorsement shall require the personal representative to file an affidavit manifesting his right, and a copy of his appointment, and if he did not receive his appointment in Kentucky the clerk shall require of him a bond with security, that he will dispose of any money collected under the execution as required by law, is directory; and an execution properly endorsed issued on such judgment, the affidavit and copy of the appointment being filed, but without the bond being given is not void but valid. Jones v. Martin, 5 L. R., 227. Analagous cases: Eddy v. Coldwell, 37 Am. S. R., 672; Cox v. Nelson, T. B. Monroe, 94; Com. v. O'Call, 7 J. J. Marshall, 151; Young v. Smith, 10 B. M., 296; L. & N. v. Smith, 87 Ky., 501.

2. An execution thus indorsed and issued within fifteen years, though perhaps irregular, is valid and will stop the running of the statute of limitation until quashed.

3. An execution thus issued and endorsed and returned "No property found" will not be quashed on motion, because the execution is not then in force and in no way imperils the execution of defendant's rights further than as a suspension of the statute of limitation.

4. The cases of Williams v. Slaton, 4 L. R., 225, and Mulholland v. Troutman's Admr., 10 L. R., 263, distinguished.

5. The rule to quash does not state grounds sufficient for a quashal of the execution. Secs. 406 and subsec. 5, sec. 402, Civil Code.

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6. (a) The motion to quash is an action within the meaning of the statute. Ky. Stats., sec. 469; Auditor v. Halbert, 78 Ky., 577. (b) And it is barred by the statute of limitations. Ky. Stats., sec. 2575.

OPINION OF THE COURT BY JUDGE PAYNTER—AFFIRMING.

The only question involved here is whether appellee's rights have been barred by the statute of limitation. Margaret A. Stembridge, on October 25, 1880, recovered a judgment against appellant J. B. McDonald. On November 4th of the same year an execution was issued on the judgment. Margaret A. Stembridge died March 2, 1891, while domiciled in the State of Indiana. The letters of administration were duly granted in Indiana. On November 2, 1895, the proper affidavit was filed with the clerk of the Henderson Circuit Court, and also a transcript of the record showing the appointment of the personal representative in Indiana. The clerk made the proper indorsement on the execution, and issued same on the date last named. He did not require the non-resident personal representative to execute the bond required by section 404, Civil Code Practice. No other execution was issued on the judgment until August 2, 1902, so, if the execution which issued November 2, 1895, did not stop the running of the statute of limitation, this action is barred, because section 2514, Kentucky Statutes, 1899, provides that an action upon a judgment or decree of any court of this State, or of the United States, or of any State or territory, shall be commenced within fifteen years from the date of the last execution. If the judgment was not alive when the execution was issued in 1902, the issuance of it could not give vitality to it. At common law, on the death of the plaintiff in the judgment, the judgment abated, but it could be revived by a writ of *scire facias*. Morgan, etc., v. Winn's Adm'r., 17 B. Mon., 244; Venable v. Smith's Ex'r.,

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1 Duv., 196. The death of the plaintiff suspends proceedings on a judgment until some one qualifies as personal representative and until an execution is issued in his name. The Civil Code of Practice points out particularly as to the affidavit and the record that shall be filed with the clerk and as to the indorsements which he shall make upon the execution. In the case at bar every requirement of the Code was fully complied with, except the execution of the bond required by section 404. Under this section, as the appointment of the personal representative was made in Indiana, it was the duty of the clerk to require of him a covenant, with good security, that he would dispose according to law of any property which he might receive upon the execution. The purpose of this bond is to protect the creditors of the decedent in this State, and not for the benefit of the defendant in the execution. From our view it is not necessary to determine whether this provision of the Code is directory or mandatory. The execution was issued in good faith, and placed in the hands of the sheriff. It evidenced a purpose on the part of the personal representative of the decedent to enforce the collection of the judgment. The execution which was issued on the judgment was as much an execution in the contemplation of law as if the clerk had fully complied with the Code by requiring the execution of the bond. The mere fact that an execution may for some reason be quashed does not change its legal designation or name. In Louisville & Nashville R. R. Co. v. Smith's Ex'r., 87 Ky., 501, 10 R., 514, 9 S. W., 493, this court held that a summons issued which was illegal, and was subsequently quashed, suspended the statute of limitation. In that case the court recognized that the summons was illegal, and did not require the defendant to answer the petition; still it suspended the running of the statute of limitation. By the stat-

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ute under consideration, in the computation of time for the purpose of determining whether it is a bar the calculation is made from the date of the last execution. We are of the opinion that the execution in question was such as would suspend the running of the statute of limitation.

The judgment is affirmed.

CASE 80—ACTION BY J. F. LANHAM AND OTHERS AGAINST W. J. McCONATHY AND OTHERS TO ENFORCE A WRITTEN CONTRACT. —Nov. 12.

McConathy, &c., v. Lanham, &c.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFFS AND DEFENDANTS APPEAL. REVERSED.

SALE OF MINERAL RIGHTS IN LAND—WRITTEN CONTRACT—PAROL EXTENSION—STATUTE OF FRAUDS.

Held: Kentucky Statutes, 1899, section 470, subsection 6, provides that no action shall be brought to charge any person on any contract for the sale of real estate, unless in writing. A written contract for the sale of mineral rights in land provided for the payment of the consideration before a certain time, and that, if not paid, the contract should be void. The consideration not being paid at this time, the parties entered into a parol agreement extending the former contract. HELD, That as the original contract was terminated by a failure to make payment as required, the parol agreement for extension of time was, under the statute, void because not in writing.

BINGHAM & DAVIS, ATTORNEYS FOR APPELLANTS.

In November, 1899, appellees signed a writing agreeing to sell appellants a mineral lease for $600, conditioned that if the consideration "is not paid on before the 31st day of December, 1899, this contract of sale shall be null and void."

This writing was signed by appellees but not signed by appellants. The appellants declined to take the lease at the price stated and the appellees filed suit alleging in their petition as

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amended that at the special instance and request of the defendants another understanding was had, by which it was agreed and understood that further time should be given the defendants within which to make said payment of said purchase money, the defendants agreeing at said time to take said lease at said sum."

Appellants' demurrer to this petition as amended was overruled and upon the trial judgment was recovered for appellee for $600.

Our contention is that the contract sued on is one to which the statute of frauds applies, *and that a contract required by the statute of frauds to be in writing can not afterwards be orally modified or varied, except in writing.*

If we are correct in this view of the law the demurrer should have been sustained and all subsequent proceedings in the case in the lower court are void.

AUTHORITIES CITED.

2 Boone on Real Property, sec. 373; Litz v. Goosling, 14 Ka. Law Rep., 91; Smith v. Causler, 83 Ky., 367; Bank of Louisville v. Baumeister, 87 Ky., 6; Boucher v. Van Buskirk, 2 A. K. Marshall, 345; Allen v. Roberts, 2 Bibb, 88; Jones v. Noble, 3 Bush, 694; Stembridge c. Stembridge's Admr., 87 Ky., 91; Austin & Maine Railroad v. Bartlett, 3 Cush, 224; Ide v. Leiser, 10 Mont., 5; Weston v. Collins, 11 Jur. N. S., 190; Harding v. Gibbs, 124 Ill., 85; Weaver v. Burr, 31 W. Va., 736; Schields v. Harbach, 30 Neb., 536; Longfellow v. Moore, 102 Ill., 289; Mason v. Payne, 27 Mo., 517; Carter v. Phillips, 144 Mass., 100; Kemp v. Humphreys, 13 Ill., 573; Potts v. Whitehead, 20 N. J. Eq., 55; Vassault v. Edward, 23 Cal., 458; Longworth v. Mitchell, 26 Ohio St., 334; Warehouse v. Terrill, 13 Bush, 463; Smith v. Theobold, 86 Ky., 141; Mallory v. Mallory, 92 Ky., 316.

ADDITIONAL AUTHORITIES FILED WITH SUPPLEMENTAL BRIEF FOR APPELLANT.

Addison on Contracts, Abbott's ed., p. 201; 1 Chitty on Contracts, 11 Am. ed., 154; Bishop on Contracts, sec. 771; Fry on Specific Performance, 3 Am ed., sec. 777; Brown on the Statute of Frauds, secs. 411 *et seq.;* 2 Reed on the Statute of Frauds, secs. 454 *et seq.;* Emerson v. Slater, 22 How., 2845, 16 Lawyers' ed., 360; Marshall v. Lynn, 6 Mees & W., 109; Goss v. Nugent, 5 Barn & Ad., 58; Harvey v. Graham, 5 Ad. & El., 61; Stowell v. Robinson, 3 Bing. N. C., 927; Stead v. Dawber, 10 Ad. & El., 57; Emmett v. Dewhirst, 8 Eng. L. & Eq., 88; Hasbrouck v.

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Tappen, 15 Johns. Ch., 429; Clerk v. Russell, Dall., 415; Abell v. Munson, 18 Mich., 306, 100 Am. Dec., 167; Harris v. Murphy, 119 N. C., 34, 56 Am. St. Rep., 671; Northup v. Jackson, 13 Wend., 85; Tarver v. McNulty, 29 Pa. St., 473; Barton v. Gray, 57 Mich., 622, 634; Wilkins v. Evans, 1 Bel. Ch., 156; Hasbrouck v. Tappen, 15 Johns., 200; Martin v. Clark, 8 R. I., 389, 395, 5 Am. Rep., 586; Gordon v. Niemann, 118 N. Y., 152; Thompson v. Poor, N. Y. Sup. Ct., Feb., 1893; Taylor on Evidence, secs. 1143, 1144; 2 Jones on Evidence, sec. 449; Atler v. Bartholomew, 69 Wis., 43, 2 Am. St. Rep., 103; Klien v. Liverpool, London & Globe Ins. Co., 22 R., 301; Warren v. Nash, 24 Ky. Law Rep., 479, No. 5.

L. H. JAMES AND OLLIE JAMES, ATTORNEYS FOR APPELLEES.

The appellants do not raise the question of the sufficiency of the evidence to sustain the verdict, but they say that the court should have sustained a demurrer to our amended petition in which we set up as follows:

"That the defendants after their purchase of the mining land specified in the original petition, did take possession of same under and in pursuance of said lease; did mine and take therefrom minerals by themselves, agents and employes; and did ship and sell same, or have same done, and received the price for which same was sold upon the market, and also did receive thereon the royalty for which said minerals were leased by others; that before the expiration of the time mentioned in the original petition the plaintiffs had a right to declare their option of said contract off, by reason of defendants' failure to comply with their contract or payment of said agreed price. At the special instance and request of the defendant another understanding was had by which it was agreed and understood that further time should be given the defendants within which to make said payment of said purchase money aforesaid, the defendant agreeing *at said time to take said lease at said sum*, and did so take it and exercise ownership over it, operating and mining it as aforesaid, and that this closed the transaction between plaintiffs and the defendants after the purchase and sale of said lease, except payment of the purchase price aforesaid to be thereafter paid within a period of sixty days from the 31st day of December, 1899."

We submit that under these allegations the demurrer to the petition was properly overruled; that the instructions of the court clearly define the law; that the evidence shows that the

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defendants did accept the lease, mine the property and exercise ownership therefor, and promised to pay the money and so did not decline to take it; and we contend that having taken possession of the property under their contract and promise to pay for it, they are bound thereby.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

In November, 1899, the appellees, J. T. Lanham, E. L. Lanham, and H. C. Truitt, executed and delivered to the appellants, W. J. McConathy and W. E. Burke, the following writing: "This contract witnesseth that: Whereas J. T. Lanham holds a lease of mineral rights in the lands owned by the Page and Krausee Mining and Manufacturing Company of St. Louis, Missouri, lying in Crittenden county, Kentucky, and, whereas, he has sold one-fourth undivided interest in said mineral lease to T. J. Carter, and one-fourth interest to E. L. Lanham, and one-fourth interest to H. C. Truitt, now we, the said J. T. Lanham, E. L. Lanham and H. C. Truitt, each bargains and sells to W. J. McConathy and W. E. Burke, both of Louisville, Kentucky, our undivided rights in said lease for and in consideration of the sum of $200.00 each, to be paid on or before the 31st day of December, 1899. It is further agreed that if the consideration herein named is not paid on or before the 31st of December, 1899, this contract of sale shall be null and void. This —— day of November, 1899, in Marion, Crittenden county, Kentucky. J. T. Lanham. E. L. Lanham. H. C. Truitt." On the 9th of July, appellees sued the appellants on this contract, and alleged that while they had a right to cancel the contract because the $600 was not paid, as stipulated, on the 31st day of December, 1899, they had not done so, because at the defendant's request that their option should be extended until the following April they had agreed thereto, and that subsequent to the 31st day of December the defendants, in

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recognition of their liability under the agreement, had promised to pay the $600. A general demurrer was sustained to the petition. Appellees then filed an amended petition, in which they allege, in substance, that before the 31st day of December, 1899, at the special instance and request of the defendant, the contract of lease was extended, and they were given sixty days longer to pay the consideration therefor; that the defendants thereafter took possession of the leased property, and operated a mine thereon. The defendants demurred to the petition as amended, which was overruled. They then filed an answer in which they pleaded that the writing sued on was a mere option, which became void, under its express terms, by failure on their part to pay the contract price of $600 on or before the 31st of December, 1899. They also deny that either before or after the 31st day of December, 1899, they made a new verbal contract with the plaintiff by which they agreed that the written option should be extended, and that they should have sixty days from the 31st of December to pay the contract price, or that they had ever taken possession of the premises under either contract, or operated a mine thereon. A trial before a jury resulted in a verdict for the $600 sued for.

Upon this appeal, appellants ask a reversal on two grounds: First, because the court erred in overruling their demurrer to the petition as amended; and, second, because the circuit judge refused, upon their motion, to direct the jury to find a verdict in their favor. The contract expressly stipulates that if the $600 is not paid on or before the 31st day of December, 1899, it should thereafter be null and void. It seems clear that after the 31st of December, 1899, appellants could not have required the appellees to have accepted a tender of the $600, for the reason that their right to do so under the contract had terminated. We think there can

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be no doubt that the writing is a mere option which the appellants could have accepted at any time before the 31st day of December by the payment of the $600, but that by their failure to comply with this requirement the option terminated. In Litz v. Gossling, 93 Ky., 185, 14 R., 91, 19 S. W., 527, the writing was very similar to that in this case and it was adjudged to be a mere option, and specific performance was refused. In Stembridge v. Stembridge's Adm'r., 87 Ky., 91, 9 R., 948, 7 S. W., 611, it was held that "where A. agrees to convey to B. upon condition that B. exercises his option to do a particular thing at a specified time, but the contract imposes no obligation upon B. to do the specified thing, no interest passes to B. unless he complies with his agreement."

The question then arises whether the alleged parol agreement by which appellants were given sixty days from the 31st of December, 1899, to pay for and take possession of the leased property, constitutes an enforceable obligation. Appellants claim that, as the original option was in writing, the subsequent verbal agreement substituting a different day for the payment of the consideration continued the writing in force, or, in other words, it was competent for the parties to a contract required by statute to be in writing to modify and change its terms of payment by a subsequent verbal agreement of the parties thereto, and that the effect of such agreement was to continue in force such contract. While the question is not free from difficulty, we think the great weight of authority is to the effect that a written contract, within the statute of frauds, can not be modified by a subsequent agreement between the parties, unless such new agreement is also in writing. See Emerson v. Slater, 22 How., 28, 16 L. Ed., 360; Swain v. Seamens, 9 Wall., 254, 19 L. Ed., 554; Chitty on Contracts (11th Am. Ed.) 154;

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Bishop on Contracts, 771; Fry on Specific Performance (3d Am. Ed.) 777. But the contention of appellees in this case goes farther than the mere changing of a written contract by a subsequent verbal agreement. If we understand correctly their contention, it is that a contract which the statute requires to be in writing, and which by its terms expires on a particular day, was kept alive and extended by a verbal agrement of the parties thereto postponing the time for the payment of the consideration. Subsection 6 of section 470 of the Kentucky Statutes of 1899 provides "that no action shall be brought to charge any person upon any contract for the sale of real estate or any lease thereof for a longer term than one year," unless in writing. As the option of 1899 was for the sale of an interest in real estate, and was for a longer period than one year, it was necessary that it should be in writing, to bind the parties thereto. That contract died on the 31st of December by the failure of appellants to perform its conditions. The alleged verbal agreement subsequently entered into between the parties was also for the sale and purchase of an interest in real estate, and was also for a longer period than one year. In our opinion, the statute requires that this contract, also, should have been in writing, before it could be made the basis of a claim against the appellants; and the trial court erred in overruling appellants' demurrer to the amended petition, and also erred in refusing appellants' motion to give to the jury a peremptory instruction to find in their favor on this ground.

For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

Petition for rehearing by appellees overruled.

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CASE 81—ACTION BY FRANCIS M. O'NEIL AND OTHERS AGAINST THE MUTUAL LIFE INSURANCE COMPANY OF KENTUCKY FOR A PAID-UP POLICY.—NOV. 17.

Mutual Life Ins. Co. of Ky. v. O'Neil, &c.

APPEAL FROM MARION CIRCUIT COURT.

JUDGMENT FOR PLAINTIFFS AND DEFENDANT APPEALS. REVERSED.

INSURANCE—FORFEITURE—PAID-UP POLICY—DEMAND—TIME—LACHES—WITNESSES—TRANSACTION WITH DECEASED AGENT.

Held: 1. Under Civil Code, sec. 606, providing that no person can testify for himself as to a transaction with one who is dead, an insured who was a party to an action to compel the insurance company to issue a paid-up policy was not entitled to testify as to a conversion between himself and an agent of the insurance company who had since died.

2. Where a life insurance policy provided that if it should be forfeited the insured should be entitled to a paid-up policy on demand within thirty days after forfeiture for the equitable value of the original policy, time was not of the essence of such agreement, and insured was entitled to a paid-up policy if demanded within a reasonable time.

3. Where an insured made no demand for the issuance of a paid-up policy until more than seven years had elapsed after a forfeiture of his original policy, and no suit was brought to compel the issuance of such paid-up policy until nearly seventeen years had elapsed after the right to such policy accrued, such right was barred by laches.

PROCTOR K. McELROY, HENRY W. PRICE AND JNO. J. M. HENRY, ATTORNEYS FOR APPELLANT.

C. S. HILL, ATTORNEY FOR APPELLEE.
(No briefs; record can not be found.)

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

On April 27, 1870, the Southern Mutual Life Insurance Company of Kentucky, appellant's predecessor, issued to

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Francis M. O'Neil a policy insuring his life in the sum of $2,500 for the benefit of his wife, Catherine E. O'Neil, and his children, payable at his death, in consideration of semi-annual premiums of $27.39 to be paid on the 23d of April and October in every year during the continuance of the policy, which contained, among others, the following condition: "In case the said assured shall not pay the said semi-annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable for the payment of the sum insured, or any part thereof, and this policy shall cease and determine. Provided, that if this policy shall become null and void by reason of the violation of any of the foregoing conditions, all payments made hereon shall be forfeited to said company; but if three or more full years' premiums shall have been paid hereon, a new and paid-up policy will be issued by said company, upon demand thereof, within thirty days after the said forfeiture, for the equitable value of the original policy." O'Neil paid the semi-annual premiums as they fell due until October 23, 1883, but was unable to pay the semi-annual premium then due, and executed therefor to the company his note due in four months, which contained this stipulation: "In consideration hereof, the policy is extended until default is made in the payment of this note, when all rights and benefits secured thereby shall cease and determine without notice, and this note shall be void; but if this note shall be paid at its maturity, then the said policy shall continue in force with like effect as if the said premium were this day paid. The receipt of this date given by said company is subject to the provisions of this note." O'Neil failed to pay the note, and the records of the company show that the policy was terminated on February 26, 1884, by reason of its non-payment.

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This is shown on the cancellation blotter of the company, giving the date when it was canceled and the reason for it. The record also shows that notice of what had been done was sent to O'Neil on June 25, 1884. On August 22, 1901, O'Neil and wife filed this suit against the company for a paid-up policy for the equitable value of the original policy at the time of default in the payment of premiums. He testified that he received no notice of the cancellation of the policy, and that as soon as he found that he could not pay the note, and about the time the note fell due, he delivered his policy to T. L. Chaplin, the agent of the company at Lebanon, where he resided, and demanded a paid-up policy; that he did not get a paid-up policy; that he asked Mr. Chaplin about it once or twice; that Chaplin said he would send it in to get a paid-up policy. After Chaplin's death, which occurred in 1892, the policy was found among Chaplin's papers, and was then returned to O'Neil. Chaplin ceased to be agent for the company in the year 1886. He was the agent of the company at Lebanon to solicit life insurance between June, 1883, and January, 1886. He had no other power or authority except to take applications for life insurance. The application for the policy, which was made in 1870, was taken by T. W. Blandford, who was then the agent at Lebanon. The defendant filed written exceptions to the testimony of O'Neil in so far as he stated what occurred between him and Chaplin, on the ground that, Chaplin being dead, O'Neil could not testify for himself as to these matters. The court overruled the exceptions. The propriety of this ruling is the first question to be determined.

F. M. O'Neil was a party to the contract and one of the plaintiffs in the action. He was therefore testifying for himself. Chaplin, the person with whom the transaction oc-

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curred, died in the year 1892. By section 606 of the Civil Code no person can testify for himself as to a transaction with one who is dead, and it has been held that the same reason which excludes the testimony of a party testifying for himself concerning a transaction with a principal who is dead, when the testimony is offered to be given, applies equally where the transaction was with an agent who is dead. Harpending's Ex'rs. v. Daniel, 80 Ky., 449, 4 R., 330; Tarr v. Kimbrough, 17 R., 1284, 34 S. W., 528; Breckinridge v. McRoberts, 20 R., 699, 47 S. W., 454; Knight v. Wilson, 22 R., 545, 58 S. W., 439. The court therefore erred in overruling the defendant's exceptions to this much of the testimony of O'Neil.

It remains, therefore, to determine whether, without this evidence, there is sufficient testimony in the case to sustain a judgment. The fact that, six years after Chaplin ceased to be agent for the company, the policy was found among his papers at Lebanon and returned to O'Neil, proves nothing against the company. In answer to the question whether at any time he demanded of the defendant a paid-up policy, O'Neil states in his deposition that he wrote the company to grant him a paid-up policy, but he does not say when this was. He also says in another place that after the death of Chaplin he wrote to the defendant demanding a paid-up policy, and the company answered that the policy had not been presented in time, and that just before he instituted the suit he again made this demand and was again refused. The proof for the company shows that it kept a record of its correspondence, and the only demand shown by this record was made in June, 1901. The policy itself provides that a paid-up policy will be issued upon demand thereof within thirty days after the forfeiture. This court has in a number of cases held that time is not of the essence of the contract

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in such cases, and that a paid-up policy may be had if demanded within a reasonable time after the default, although not demanded within the time fixed by the contract; and it has laid down the rule that five years is a reasonable time for making the demand. Mutual Life Insurance Company v. Jarboe, 102 Ky., 80, 19 R., 1501, 42 S. W., 1097, 39 L. R. A., 504, 80 Am. St. Rep., 343; Manhattan Life Insurance Company v. Patterson, 109 Ky., 624, 22 R., 1282, 60 S. W., 383, 53 L. R. A., 378; Washington Life Insurance Company v. Miles, 112 Ky., 743, 23 R., 1705, 66 S. W., 740; New York Life Insurance Company v. Warren Deposit Bank, 24 R., 325, 75 S. W., 234. In the last case it was held that the failure to make a demand within five years defeated the right to a paid-up policy where the company simply remained silent without attempting to collect the note. In this case the defendant took no steps to collect the note, and did nothing to waive its right to insist upon the forfeit. Outside of the testimony of O'Neil as to what took place between him and Chaplin which can not be considered, there is nothing to show a demand on the company for a paid-up policy within five years after the forfeiture occurred. The only time fixed by O'Neil as that at which he wrote to them making this demand is after the death of Chaplin, which was in 1892, or more than seven years after the default. No explanation is given of the long delay, after Chaplin ceased to be agent in 1886, or even after his death in 1892, to file this suit. It is a cardinal principle of equity to refuse relief to those who have unreasonably slept on their rights. The suit was not filed for something like seventeen years after the right accrued to demand a paid-up policy, and under the rule heretofore laid down there can be no recovery.

The insured had an option to stand upon his original policy and his rights thereunder, or to take a paid-up policy for

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the equitable value of his original policy. The provisions of the contract as to a paid-up policy are not self-executing. He was to demand the paid-up policy in thirty days after default in the payment of premiums if he wanted it. Although the court refuses to enforce strictly the limit as to time, and allows a demand within a reasonable time, still it must follow from the contract, on well-settled, legal principles, that, if no demand is made within the proper time for a paid-up policy, the right thereto will be deemed waived. For the policy expressly provides that on default in the payment of premiums it shall cease and determine, and unless something is done to arrest the operation of this provision the policy is no longer in force. The insurance company must have some basis for carrying on its business with the living and settling the claims of the dead, and, as in other cases of failure to make an election, it must be presumed after a reasonable time that the insured did not elect to exercise his option to surrender his original policy and take a paid-up policy for its equitable value.

Judgment reversed, and cause remanded for a judgment as herein indicated.

Judges Paynter and Nunn dissent.

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CASE 82—INDICTMENT AGAINST W. R. WOOD FOR MALFEASANCE IN OFFICE AS COUNTY CLERK FOR UNLAWFULLY ISSUING LIQUOR LICENSE. —NOV. 18.

Commonwealth v. Wood.

APPEAL FROM TODD CIRCUIT COURT.

JUDGMENT SUSTAINING DEMURRER TO INDICTMENT AND COMMONWEALTH APPEALS. AFFIRMED.

COUNTY CLERK—MISFEASANCE—INDICTMENT—SUFFICIENCY.

Held: An indictment of a county clerk for unlawfully issuing a license to sell liquor in a local option precinct, which fails to aver that his action was from a corrupt motive or fraudulent, or that he knew at the time that it was unlawful for him to issue the license, is insufficient.

CLIFTON J. PRATT, M. R. TODD, JAS. R. MALLORY, ATTORNEYS FOR APPELLANT.

Appellee was indicted as clerk of the Todd County Court for unlawfully issuing a license to Cyrus Greenfield to retail spirituous liquors in the town of Trenton in said county after a certificate had been filed in his office by the canvassing board of said town certifying that the local option law had been adopted in said town. We contend that the appellee having this official information in his office, and knowingly issued a license to an applicant to sell liquors in a town where the sale has been prohibited by the expressed will of the voters therein at an election held for that purpose, is guilty of misfeasance in office in failing to obey and discharge a known duty by refusing to issue the license.

We contend that it is not necessary to allege that he was actuated by a corrupt motive in doing this act, but that the failure to discharge a known duty is a sufficient allegation to render him liable for misfeasance in office.

We further contend that though the license may have been granted by him upon the order or by the direction of the trustees of the town of Trenton will not excuse him, for the reason that he had before him a record in his office saying it was un-

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lawful to sell liquor in said town and he owed it to the public and it was his duty to recognize said record.

We further contend that an allegation that the appellee unlawfully and willfully issued such license without legal or rightful authority so to do is sufficient to include corrupt motive and criminal intent.

14 Bush, 161; 19 Am. & Eng. Ency. of Law, 502; 2 Am. Dec., 629; Ky. Const., secs. 124, 227; Ky. Stats., sec. 3748; Bishop's Statutory Crimes, sec. 164, p. 155; 23 Ky. Law Rep., 1718.

PETREE & STANDARD, ATTORNEYS FOR APPELLEE.

POINTS AND AUTHORITIES.

1. It is necessary to charge in the indictment that appellee issued the license corruptly, or with a knowledge that it was unlawful for him to do so. The indictment does not charge that appellee acted from a corrupt or improper motive. Scott v. Cook, 1 Duvall, p. 315; Com. v. Arnold, 3 Litt., 309; Com. v. Barney, 21 Ky. Law Rep., p. 2352; Lynch v. Com., 25 Ky. Law Rep., p. 2180; Com. v. McPeek, 14 Ky. Law Rep., 215.

2. The indictment having attempted to set forth all of the material steps required by the statute in order to make a valid option law, and having failed to set forth certain material requirements of the statute, is bad.

(a) It attempts to set forth not only every order taken in regard to the election, but all the acts of the sheriff. Having attempted to set forth the acts of the sheriff, it should have alleged that notice of the holding of the election was given by him as required by statute, and the failure to charge this is fatal to the indictment. Com. v. Cope, 21 Ky. Law Rep., 845.

(b) The local option law requires the certificate of the board of canvassers to be placed on the order book at the next regular term of the county court after it is completed; the indictment discloses that it was not so placed on record until nearly two years after the holding of said election. This long delay is fatal to the indictment, especially when unexplained.

3. The allegations of the indictment do not charge a public offense. Young v. Com., 14 Bush, 161; Payne v. Com., 14 R., 303; Schweaman v. Com., 99 Ky., 296; Com. v. Helback, 19 Rep., 278; Adams v. Stephens, 88 Ky., 443.

4. Appellee as clerk of the Todd County Court is not subject to indictment for malfeasance in office. Const., sec. 227; Broaddus v. Broaddus, 10 Bush, 299; Patterson v. Commonwealth, 86 Ky., 314; Parrish, &c., v. Ferguson, &c., 83 Ky., 18; Com. v.

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Chambers, 1 J. J. Marsh., 108; Ky. Stats., sec. 3748; Com. v. Williams, 79 Ky., 43; Consti., sec. 124.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

Appellee was indicted by the grand jury of Todd county for malfeasance in office. It is charged that he, as county court clerk of Todd county, "willfully and unlawfully" issued a liquor license to one Greenfield to sell liquor by retail in the town of Trenton, when previously that town had, at an election regularly held, voted in favor of the local option law, and that the result of the vote, duly certified, was of record in his office. The only question presented that we have felt called upon to decide or consider is the sufficiency of the charge as made in the indictment. It is not averred that appellee's action was from a corrupt motive or fraudulent, or that he knew at the time that it was unlawful for him to issue the license. While malfeasance in office is defined generally to be the wrongful or unjust doing of some official act, which the doer has no right to perform, or which he has stipulated by contract not to do, it is essential that an evil intent or motive must accompany the act, or that it must have been done with such gross negligence as to be equivalent to fraud. As said in Bishop's New Criminal Law, section 972: "The court requires evidence of something more than a mere mistake of duty. There must be corruption. This also is necessary to sustain an indictment." And in the same author's work on New Criminal Procedure, section 834, it is said: "Corruption, in some form of words, must generally be averred; it is believed, always at common law." An honest mistake of an officer concerning the discharge of an official duty, although it may be the result of ignorance, ought not to, and can not, unless the express terms of the statute impel to such construction,

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make him a criminal. If the act is done with a corrupt purpose, or from a corrupt motive, or with a knowledge by the officer at the time that his official act is a violation of the law, or if the act is done so negligently or carelessly or recklessly as to show an utter want of care or of concern, and such as would be tantamount to a fraud, and therefore could be said to be fraudulently done, his act will be a malfeasance, but not otherwise. Commonwealth v. Arnold, 3 Litt., 309; Commonwealth v. Barney, 24 R., 2352, 74 S. W., 181; Lynch v. Commonwealth, 24 R., 2180, 73 S. W., 745; Commonwealth v. McPeek, 14 R., 215, 20 S. W., 220; Commonwealth v. Rodes, 6 B. Mon., 171; Commonwealth v. Chinn, 110 Ky., 527, 22 R., 1921, 62 S. W., 685.

Wherefore the judgment of the circuit court sustaining the demurrer to the indictment is affirmed.

CASE 83—ACTION BY W. L. GRUBBS AGAINST S. P. McDOWELL, SHERIFF, FOR AN INJUNCTION TO PREVENT THE SALE OF HIS HOMESTEAD UNDER AN EXECUTION LEVY.—NOV. 18.

McDowell, Sheriff, v. Grubbs.

APPEAL FROM BOYLE CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

EXEMPTIONS—HOMESTEAD—LIFE ESTATE—VALUE—HOW DETERMINED.

Kentucky Statutes, 1899, section 1702, provides that there shall be exempt from sale under execution land not to exceed in value $1,000; and section 1703 declares that, before a sale under execution of land occupied as a homestead, the officer shall cause such part thereof as shall not exceed in value $1,000 to be set apart to the debtor. Held, that where a debtor was seised of a life estate only in land, which he occupied as a homestead he was entitled to a homestead exemption in such part of the

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land as was worth $1,000, and not such part with regard to which the value of a life estate therein would equal $1,000.

EMMET V. PURYEAR, W. REED EMBRY AND JNO. C. VORIS, ATTORNEYS FOR APPELLANT.

The sole question arising on this appeal is: In allotting homestead in land to an execution debtor, who owns only a life estate therein, shall the fee simple value of the land be estimated, and he have set apart to him as his homestead $1,000 worth of the land, including the dwelling house and appurtenances, or shall the value of the life estate only be estimated, and he be allotted as his homestead, not $1,000 worth of land, but such a quantity in which his life estate or life interest therein is worth $1,000?

In other words what shall be the basis of the valuation in setting apart his homestead?

The court below says, the life estate.

We claim that this is error, and that where the debtor owns only a life estate in land, the fee simple value of the land should be estimated in setting apart his homestead therein.

1. Because, in the statutes exempting homesteads from sale for debt, no reference is made to the estate or interest of the debtor in the property, but the amount of the exemption is simply limited to $1,000 worth of land.

2. Because when the value of land is spoken of, without any reference to the interest, title, or tenure of the owner, or without any words limiting, restricting, or qualifying the meaning of the term, the value in fee simple is always meant.

3. It was intended by the Legislature in the enactment of our homestead laws, that they should operate uniformly and equally upon all persons coming within the operation of the statute; that homestead debtors should have equal rights and benefits thereunder; that there should be a uniform rule for determining the amount of the exempted property, and that no one class of debtors should have an advantage over any other class; and this result can only be reached by making the *value of the fee* the *basis*, in all cases regardless of the interest owned by the debtor in the land.

4. Because, these laws were intended to provide for the debtor *a home* where he may shelter and support his family and not something that he might sell and barter away and realize $1,000 therefor.

5. Because, if valuable properties can be held as homesteads under the pretense that the claimants had less than titles in fee simple therein, schemes could easily be contrived with relatives and friends, by which the machinery of the homestead law, de-

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signed for beneficent purposes, could be used as means of dishonesty and fraud.

AUTHORITIES CITED.

Ky. Statutes, sec. 1702, 1703; Robinson v. Smithey, 80 Ky., 636; Waples on Homestead and Exemption, pages 42, 116, 117 and 166; Brown v. Starr, 79 Cal., 608; (21 Pac. 973); Spencer v. Gueesman, 37 Cal., 99; Brooks v. Hyde, 37 Cal., 366; Yates v. McKibben; Sheriff, etc., 66 Iowa, 357; (23 N. W., 752); Arnold v. Jones, 9 Lea, (Tenn.) 545; Franks v. Lucas, 14 Bush, 395; Crigler, etc., v. Connor, etc., 11 S. W., 202 (10 R. 958); Suter, etc., v. Quarles, etc., 22 R., 1080.

CHAS. H. RODES, C. C. BAGBY AND R. G. McKEE, ATTORNEYS FOR APPELLEE.

Appellant, as sheriff, levied an execution for $300 on a portion of appellee's life estate in thirty acres of land in Boyle county, on which there is a dwelling house, although it is agreed and conceded that appellee's entire life estate in said thirty acres is worth less than $1,000.

It is conceded that appellee is entitled to a homestead in the thirty acres, but this controversy arises over the extent of it. Appellee in his petition for an injunction, alleged that he was a housekeeper with a family and that his life estate in said thirty acres is worth less than $1,000, and this averment is not denied.

1. We contend that the statute estimates and measures the homestead right by *value* and nothing else.

2. This right did not exist at common law, but was created by statute, and the extent of the right must in this State be determined by the statute of this State and not by the statute of some other State.

3. The language making the exemption is: "So much land *owned* by the debtor," not so much land owned by the debtor's wife, or the debtor's children; but so much owned by the debtor alone; the only limitation being one of *value* and *value alone.*

4. If the theory of appellant be adopted, then property would be considered, in estimating the homestead exemption, which the appellee did not own, and this the Legislature coud not do and did not intend to do.

5. The interest of the remainderman in the thirty acres can not be made to contribute to make up the homestead which the statute exempts to him out of his property.

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6. If appellant's theory be adopted the value of the life estate would be largely diminished, and the debtor's power to sell his homestead and acquire a new one would be greatly impaired and thus one of the beneficent ends of the benvolent statute would be defeated.

7. We submit that no decision of any court in any other State can be even persuasive authority on this question, unless the statute of such State on which the decision is based, is similar in phraseology to the Kentucky statute.

AUTHORITIES CITED.

Cin. Tobacco W. Co. v. Mathews, &c., 24 Ky. Law Rep., 2445; Johnson v. Kessler, 87 Ky., 458; Century Dictionary, vol. 3, 2010; Robinson v. Smithey, 80 Ky., 637; Huntington v. Barnes, 22 Ky. Law Rep., 497; McTaggart v. Smith, 14 Bush. 415; Mundt v. Hagedon, 68 N. W. Rep., 610; Mason v. Columbia Finance & Trust Co., 99 Ky., 118; Vanmeter v. Vanmeter, 12 Ky. Law Rep., 214; Squire v. Mudgett, 63 New Hampshire, 71; Donahue v. Mutual Life Insurance Co., 21 Ky. Law Rep., 357; Crigler v. Connor, 10 Ky. Law Rep. 958; Suter v. Quarles, 22 Ky. Law Rep. 1080. Waples on Homestead and Exemption, pages 116, 117 and 211. Iowa Homestead Exemption Act, Waples on Homestead and Exemption, page——

Tennessee Homestead Exemption Act, Waples on Homestead and Exemption, page——

Kentucky Homestead Exemption Act, Waples on Homestead and Exemption, page——

OPINION OF THE COURT BY JUDGE NUNN—REVERSING.

The appellant as sheriff of Boyle county, having had placed in his hands an execution against the estate of the appellee, Grubbs, issued from the Boyle circuit court upon a judgment rendered in favor of Nanny Pence against appellee, the sheriff levied this execution upon appellee's life estate in a tract of land lying in Boyle county, containing about thirty acres, subject to the homestead right of appellee in this property. Appellant caused to be appraised and set aside to appellee, Grubbs, a portion of this land, including the dwelling house and appurtenances, of the value of at least $1,000, as his homestead therein, and advertised for sale under this

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execution the life estate of appellee in the residue of this land. Appellee filed his petition in equity in the Boyle circuit court, alleging that he had and was entitled to a homestead in this tract of land, and that the interest owned therein by him was a life interest or life estate only; that the value of his life interest in the whole of this land was worth less than the sum of $1,000, and that he was entitled to hold the whole of this tract of land as a homestead; and he obtained an injunction against the appellant, enjoining and restraining him from selling this property, or any part thereof, and asked that the whole of it be adjudged to him as a homestead. Appellant filed his answer, averring that he levied this execution upon appellee's life estate in this land, subject to his homestead exemption therein, and that, before advertising his life estate for sale under the execution, he selected two disinterested housekeepers of Boyle county, not related to either party, who, being duly sworn, valued and set apart to appellee, as his homestead in this land, a certain part of same, including the dwelling house and appurtenances —this valuation and allotment being made in writing—and that the portion of this property so valued and set apart to appellee as his homestead was worth more in fee simple than the sum of $1,000, and that he was seeking to sell only the life estate and life interest of appellee in the remainder of this property, and denied that plaintiff was entitled to the whole of the land as a homestead. Appellee filed a general demurrer to this answer, which was sustained by the court, and the court granted a permanent injunction against appellant, perpetually enjoining him from selling this land, or any part thereof, and the appellant has appealed from that judgment.

The only question raised on this demurrer, as shown by the judgment, was whether the homestead right of the ap-

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pellee should be based upon the value of the fee, or upon the value of the life estate. The court below took the view that the homestead right of appellee should be based upon the value of the life estate, and for that reason sustained the demurrer. The sole question arising, then, on this appeal, for the consideration of this court, is, did the court below err in sustaining this demurrer, or, in other words, in allotting homestead to a debtor who owns only a life estate therein, shall the fee-simple value of the land be estimated, and he have set apart to him as a homestead $1,000 worth of the land, including the dwelling house and appurtenances, or shall the value of the life estate only be estimated, and he be allotted, as his homestead, not $1,000 worth of land, but such a quantity of land, his life estate in which is worth $1,000? This question must be determined upon the construction of the sections of our statute applicable thereto. We quote so much of section 1702 of the Kentucky Statutes of 1899 as relates to the question involved: " . . . There shall . . . be exempt from sale under execution . . . so much land including the dwelling house and appurtenances, owned by debtors . . . as shall not exceed in value one thousand dollars. . . ." Section 1703 says: "Before a sale under execution, attachment or judgment of land occupied as a homestead, the officer in whose hands the writ or judgment may be shall cause such part thereof . . . as shall not exceed in value one thousand dollars to be valued under oath and set apart to him," etc. In our opinion, it was the intention and purpose of the Legislature, in the enactment of these statutes, to exempt to the debtor entitled to the exemption $1,000 worth of land in which he had a sufficient estate or ownership to support a homestead. It is the settled law of this State that the owner of a life estate in land may be entitled to a homestead therein;

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that his title is sufficient to support a homestead. Robinson v. Smithey, 80 Ky., 636, 4 R., 541. It seems to us plain, from the foregoing sections of the statutes, that the amount of the exemption is to be limited to $1,000 worth of land, regardless of the title or tenure by which it is held. No reference is made to the estate or interest of the debtor in the property, but the amount of the exemption is simply limited to $1,000 worth of land. The statute says "so much land as shall not exceed in value one thousand dollars." Section 1703, in substance, says that the officer shall cause such part of the land as shall not exceed in value $1,000 to be set apart to the debtor. It makes no reference to the character of title held by the owner or occupier of the homestead. It surely was intended by the Legislature, in the enactment of our homestead laws, that they should operate uniformly and equally upon all persons coming within the operation of the statutes; that homestead debtors should have equal rights and benefits thereunder; that there should be a uniform rule for determining the amount of the exempted property; and that no one class of debtors should have an advantage over any other class or classes. This result can only be reached by making the value of the fee the basis in all cases, regardless of the interest owned by the debtor in the land. Such would certainly not result from the application of the rule contended for by appellee in this case. Should the view contended for by appellee be sustained, and the debtor owning only a life estate in land be allowed to hold, use, and occupy as a homestead, and enjoy the rents and profits from, the land in which the life interest is worth $1,000, then this class of debtors, by reason of their owning a lesser estate in the land, would have an advantage over, and receive greater benefits from the homestead right than debtors owning the fee-simple or absolute

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title to their land. To illustrate, suppose a like execution debtor owned in fee thirty acres of land adjoining appellee. Under the construction of the statutes as contended for by appellee, the appellee would be given a home and the use of the whole thirty acres for the balance of his life, free from sale under execution, while his neighbor, owning the fee, would be compelled to take as his home, against the execution, his house and possibly ten acres of land—at any rate, less than the thirty acres. The purpose and object of these laws is the conservation of family homes; to secure to the housekeeper with a family the possession of his home where he may shelter, support, and rear his family without being in constant danger and fear of judicial writs and the auctioneer's hammer. They were intended to merely protect the possession and right of occupancy, and not to provide for the debtor something that he might sell or barter away, and realize $1,000 therefrom. The value of the possession and right of occupancy of $1,000 worth of land in which a person owns only a life estate is exactly the same as if he owned the fee. The following cases, in our opinion, support the views above expressed: Crigler v. Connor, 10 R., 957, 11 S. W., 202; Franks v. Lucas, 14 Bush, 395; and Suter, etc., v. Quarles, etc., 22 R., 1080, 58 S. W., 990.

Wherefore the judgment is reversed, and the cause remanded for further proceedings consistent herewith.

Judge O'Rear delivered a dissenting opinion:

I have always been of the opinion that the Legislature intended by the statute quoted to exempt to a debtor not exceeding $1,000 worth of his own land, which may be occupied by him and his family as a homestead. I do not see that it could matter to the creditor whether the debtor's exempted homestead consisted in the fee or the life estate.

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The question is not how much enjoyment the debtor may get out of his property, but what value of property shall be exempted to him from liability for his debts. I therefore respectfully dissent from the majority opinion in this case.

Petition for rehearing by appellee overruled.

CASE 84—ACTION BY THE GAMEWELL FIRE ALARM TELEGRAPH CO., AGAINST THE FIRE & POLICE TELEGRAPH CO., AND THE NEW GAYNOR ELECTRIC CO., FOR THE APPOINTMENT OF A RECEIVER OF BOTH COMPANIES, AND THE PAYMENT OF PLAINTIFF'S DEBT OF $8,000.—Nov. 18.

Gamewell Fire Alarm Telegraph Co., v. Fire & Police Telegraph Co., &c.

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APPEAL FROM JEFFERSON CIRCUIT COURT. CHANCERY DIVISION.

FROM THE JUDGMENT PLAINTIFF APPEALS. AFFIRMED.

CORPORATIONS— STOCKHOLDERS —DOUBLE LIABILITY —ENFORCEMENT — SOLE STOCKHOLDERS— ACTIONS— COUNTER CLAIM— PARTIES — RIGHTS OF CREDITORS—ATTORNEY'S FEES—ALLOWANCE—RIGHT TO OBJECT.

Kentucky Statutes, 1899, section 547, provides that stockholders of corporations not "organized" for educational purposes, or for operating of water, gas, or electric plants, shall be individually responsible for their liabilities to the extent of the amount of their stock at par, in addition to the amount of such stock; and section 573 declares that after September 28, 1897, the provisions of the chapter containing the previous section shall apply to all corporations organized in the State, if such provisions would be applicable to them if organized under such chapter. Held, that where a corporation previously organized for the purpose of "exploiting or promoting" the fire and police telegraph business, and to purchase and otherwise acquire stocks, bonds, and other obligations of other corporations, etc., continued its business after section 573 went into effect, its stockholders were subject to the double liability prescribed by section 547.

2. Under Civil Code, section 28, providing that the court may determine any controversy between parties before it, if it

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can do so without prejudice to others, it was not error to enforce a statutory double liability against a stockholder of an insolvent corporation without the other stockholders being made parties; the obligation of such stockholder being several, and not joint.

3. Where a corporation purchased all the stock of another corporation, the stockholders, of which were subject to the double liability prescribed by Kentucky Statutes, 1899, section 547, the fact that the purchasing corporation was the sole stockholder, and was itself a corporation, did not alter its double liability as such under the statute.

4. Under Civil Code, section 96, defining a counterclaim, where plaintiff sued to have the affairs of certain corporations placed in the hands of a receiver, and part of the assets consisted of claims against plaintiff and other stockholders to enforce a statutory double liability, a pleading filed by such defendant corporations to enforce plaintiff's double liability constituted a proper counterclaim.

5. Where suit was brought for the liquidation of certain insolvent corporations, the creditors of which were numerous, and it was impracticable to bring them all before the court within a reasonable time, and a plaintiff procured an injunction restraining all such creditors from bringing or prosecuting any action on their claims except in such suit, and certain other creditors were permitted to prosecute and defend for all the other creditors, as authorized by Civil Code, section 25, it was proper for the court, in such action, to render judgment establishing all the claims of other creditors filed and allowed therein as against such corporations.

6. Where plaintiff in an action for the liquidation of certain corporations appeared by its own counsel, it could not object to an order allowing a certain per cent. of the amounts recovered by counsel for other creditors not represented by special counsel, as attorney's fees.

DODD & DODD, ATTORNEYS FOR APPELLANT.

POINTS AND AUTHORITIES.

1. The pleadings of appellee, the E. A. Kinsey Company and Southern Electric Company, representative creditors, respectively, of the New Gaynor Electric Company and Fire & Police Telegraph Company, do not state facts sufficient to constitute a counter-claim, and being by a defendant and against a plaintiff can not be a cross petition. Sec. 96, Civ. Code; Grimes v. Grimes, 88 Ky., 20; Cummings v.

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Bradford's Adm'r, 14 Ky. Law Rep., 527; Buckler v. Reese, 14 Ky., Law Rep., 80; Crabtree v. Banks Adm'r., 1 Met., 482; Forbes & Bro. v. Cooper & Co., 88 Ky., 285

2. Any suit having for its purpose an enforcement of the double liability against stockholders of corporations under section 547 of Kentucky Statutes should be against all of the stockholders of the corporation as a necessity to an adjustment of the equities and rights of all concerned. Vol. 20 Ency. of Pleading and Practice, 726; secs. 219 and 222, Cook on Corporations; secs. 3492, 3496 and 3515, Thompson on Corporations; Pollard v. Baily, 20 Wall., 520; Cuykendall v. Miles, 10 Fed., Rep., 344; Globe, &c., Co. v. Bank, 41 Neb., 171.

3. The provisions of section 532 of the Civil Code that make all creditors appearing before the commissioner in settlement suits parties to the action, and concluded by the final judgment of the court allowing or rejecting their claims, do not authorize the rendition of personal judgment on the claims of creditors. Homer v. Harris' Executor, 10 Bush, 356; Harris v. Moberly, 5 Bush., 556; Francis v. Smith, 1 Duv., 126; sections 115 and 705 Civ. Code.

4. Proving a claim before a commissioner in the settlement of an insolvent's or decedent's estate is not a suit, and will not stop the running of the statute of limitations on any unsatisfied balance of the claim. Harris v. Moberly, 5 Bush, 556.

5. Under our system of civil procedure *no personal judgment* can be rendered in favor of any party who has not asserted his right, by appropriate pleading and service of process upon the party from whom such relief is sought. Francis v. Smith, 1 Duv., 121 to 126.

6. A party who employs counsel of his own selection and appears by such counsel before a commissioner in a settlement suit for the purpose of making proof of and having his claim allowed can not be required to contribute to the payment of counsel employed by other creditors of such estate. Thirlwell's Admr. v. Campbell, 11 Bush, 163.

7. It appearing from the charter of the Fire & Police Telegraph Company that its business was solely and exclusively that of selling agent of appellant in the construction and installation of fire alarm telegraph and police alarm telegraph plants its stockholders are subject to no double liability under the statute. Section 547, Kentucky Statutes.

8. The double liability imposed by section 547 of Kentucky Statutes is only for the benefit of creditors, and can only extend to the stockholder or stockholders of the debtor corporation, and where a corporation owns stock in another corporation the estate of the stockholding corporation is the measure of its liability.

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RANDOLPH H. BLAIN, ATTORNEY FOR APPELLEES, NEW GAYNOR ELECTRIC COMPANY, AND FIRE & POLICE TELEGRAPH COMPANY.

The appellees, the New Gaynor Electric Company, hereafter called the New Gaynor Company, and the Fire & Police Telegraph Company, hereafter called, the Fire & Police Company, are only interested in this appeal to the extent of having the assets of each company properly distributed to the creditors of each. Occupying that attitude they must confess all the objections made by appellants to the judgment below as too manifestly well taken to admit of question.

The court's attention is called to one matter not fully dealt with by the appellant in his brief, which seems to counsel an error that should be corrected. The Fire & Police Company proved a debt against the New Gaynor Company in the sum of $13,325.54 which the commissioner found to be a proper claim, but under the order of the court he was compelled to postpone its payment until all the other creditors of the New Gaynor Electrick Company had been fully paid out of the assets of that company. It is contended that this demand in favor of the Fire & Police Company against the New Gaynor Company was a part of the assets of the Fire & Police Company, and that the dividend upon it was subject to distribution among the creditors of that company. Was it a proper claim?

The record shows that the New Gaynor Company was regularly incorporated under the Kentucky Statutes, and a going concern up to the date of the liquidation herein. The Fire & Police Company was regularly incorporated under the Kentucky Statutes after the New Gaynor Electric Company, but with extended powers, and was a going concern up to the end. The Fire & Police Company acquired all the stock of the New Gaynor Company, the stockholders in the two companies being substantially the same. Regular accounts were kept between the two companies, the business being conducted on somewhat different lines. The New Gaynor Company became indebted to the Fire & Police Company in the amount above set forth. The officers of the companies, to reduce this indebtedness, within four months of the liquidation, transferred on the books to the Fire & Police Company, assets of the New Gaynor Company of the book value of $——. The transfer does not appear to have been made with fraudulent intent, although perhaps a legal fraud, and was simply a misjudged and impotent floundering on the part of the officers of the two companies in the face of pending disaster. The court properly set aside the transfer. This should have placed the two corporations in statu quo, the Fire & Police Company holding its claim against the New Gaynor Company unim-

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paired, and the New Gaynor Company holding the property it had attempted to transfer. The claim in favor of the Fire & Police Company anginst the New Gaynor Company was found, by the commissioner, to be a proper claim. It is nowhere shown to be invalid or fictitious. It arose through the mutual business transaction between the two corporations, being mostly for borrowed money. It was quite as much an asset of the Fire & Police Company as was the personal property in the possession of the New Gaynor Company one of its assets. The creditors of the Fire & Police Company had the same right to look to the debt against the New Gaynor Company as an asset subject to their demands, as the creditors of the New Gaynor Company had the right to look to the property held by that Company as assets in its hands subject to their debts. The creditors of each company had a right to look to all the property of each, whether material or choses in action, for the payment of their respective debts. The court, by its order to the commissioner and by its judgment, in effect cancelled the claim of the Fire & Police Company against the New Gaynor Company, and to that extent took the assets of the Fire & Police Company to pay the debts of the New Gaynor Company. Not only so, but it held that the assets of the Fire & Police Company were primarily liable to the creditors of the New Gaynor Company.

It is respectfully submitted that the orders of the court aforesaid, were in direct conflict with the rule laid down by this cour,t in Louisville Gas Co. v. Kaufman, 20 R., 1069; Louisville Banking Co. v. Eisenman, 94 Ky., 83.

Uuder these authorities it seems plain that the debt of the Fire & Police Company against the New Gaynor Company should have been allowed to pro rate with all the other creditors of the latter company; that the assets of the Fire & Police Company were in no maner liable for the debts of the New Gaynor Company.

We ask that this contention be sustained.

McDERMOT & RAY, ATTORNEYS FOR APPELLEES, THE E. A. KINSEY COMPANY, AND THE SOUTHERN ELECTRIC COMPANY, REPRESENTING CREDITORS, ETC.

Answers to propositions or objections presented in the brief of the appellant, the Gamewell Fire Alarm Telegraph Company. Appellant did not come into this court of equity with clean hands and has no standing in a court of equity.

1. Answer to appellant's first objection:

(a) The pleading of the appellees, the E. A. Kinsey Company and the Southern Electric Company, representative creditors re-

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spectively of the New Gaynor Electric Company, and the Fire & Police Telegraph Company, state facts sufficient to constitute a counterclaim. Ky. Stat., sec. 547; Civ. Code, sec. 96, subsec. 1; Newman's Pleading and Practice, (Ky.), 615; Peter v. Farrell Foundry Machine Co., 53 Ohio St., 550; Story's Equity Pleading, secs., 389 and 392; National, &c., Bank v. St. Anthony's Park, &c., 63 N. W. Rep., 1068; Hessler v. The Cleveland Punch, &c., Co., 61 Ohio St., 621; County School Board v. Farish, 92 Va., 156; Tinsley v Tinsley, 15 B. Mon., 459; Morawetz on Corporations, sec., 884; Monger v. Jacobson, 99 Ill., 349; Kincaid v. Quinelle, 59 N. Y., 548; Patterson v. Lynde, 112 Ill., 196; Morgan v. Lewis, 46 Ohio St., 1.

(b) A non-resident creditor, who owns stock in an insolvent, Kentucky corporation can not come into a court of equity in this State and subject to the payment of his debt the assets of the insolvent domestic corporation, upon which other creditors have equal claims, and escape from the jurisdiction of our courts with a part of this trust fund in its hands, and thereby lessen the pro rata of other creditors, without first doing equity by paying to these other creditors the amount of his statutory liability to them upon these corporate debts, as a stockholder in the insolvent corporation. And he can not tie the hands of the other creditors by making them defendants to his action. They can enforce their rights and protect themselves by a counterclaim against him. (See authorities above referred to.)

2. Answer to appellant's second objection:

(a) It is neither necessary nor feasible to make all of the stockholders of the Fire & Police Company parties to this action. Ky. Stats., sec. 547, (Civ. Code, sec. 28); Castleman v. Holmes, 4 J. J. Mar., 1; Civ. Code, sec., 28; Ency. of Pl. and Pr., vol. 20, p. 724; Obermeyer v. Cannon, 82 Ind., 457; Thompson on Corporations, 3494, and sec. 3502, vol. 3; Grund v. Tucker, 5 Kans., 70; Norris v. Johnson, 34 Me., 458; Culliver v. Third National Bank, 64 Ill., 528; Bullard v. Bell, 1 Mason, 243.

(b) The rule requiring all parties having an interest in the subject of the action to be made parties is merely a rule of convenience, and will not be enforced when it will work an injury or great inconvenience. Ency. of Pl. and Pr., vol. 15, p. 651.

(c) The court may determine any controversy between the parties before it if it can do so without prejudice to others. Civ. Code, sec. 28; Castleman v. Holmes, 4 J. J. Mar., 1.

(d) The double liability statute (sec. 547, Ky. Stat.) fixes the measure of the stockholders' liability. That liability is not joint nor does the amount thereof depend upon that of any other stockholder. The liability of each stockholder is several,

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and not one for the other. Ky. Stat., sec. 547; Castleman v. Holmes, 4 J. J. Mar., 1; (see also authorities under "a", this heading).

(e) Where there are no equities to be adjusted between a party to a suit and a third person, the party can not complain of a judgment against him on the grounds that such third person is also indebted to the one in whose favor the judgment is rendered.

(f) If there were any equities to be adjusted between appellant and other stockholders of the Fire & Police Company, it was the duty of appellant to have brought them before the court, if it desired the adjustment. Thompson on Corporations, sec.—

(g) The court did not prejudice any of the substantial rights of appellants by determining this action between the parties before it. The judgment should therefore, be affirmed. Civ. Code, sec. 756.

3. Answer to appellant's third, fourth and fifth objections:

The personal judgment complained of herein was rendered upon appropriate pleadings filed by the representative creditors respectively of the Fire & Police Company and New Gaynor Company in behalf of themselves and all other creditors of said respective corporations, together with the proper proof of all of said claims and depositions and exhibits properly filed herein. (See Order of Court, Record, page ——; Civ. Code, sec. 25; Whaley v. Com., 23 Ky. Law Rep., 1295; Gorley v. City of Louisville, 23 Ky. Law Rep., 1782; Flint v. Spurr, 17 B. Mon., 500; Shannon v. Frost, 3 B. Mon., 253; Civ. Code, sec. 756; Williams v. Rogers, 14 Bush, 776.

4. Answer to appellant's sixth proposition or objection:

(a) Appellant was adjudged to pay no part of the attorney's fee complained of nor is said fee to be paid out of any fund to which it has any claim. It was adjudged to be paid out of the amount recovered by certain creditors for whom the Southern Electric Company and the E. A. Kinsey Company respectively defended herein under the order of the court. The parties out of whose funds it was ordered to be paid are not objecting, And appellant has absolutely no interest in the matter and will not be heard to complain about matters that do not concern it. Russell v. Hart & Co., Sneed, 308; Johnson v. Rankin, 3 Bibb, 87; Oldham v. Rowan, 4 Bibb, 546.

(b) The court properly allowed the attorneys of said representative creditors said fee for their services in behalf of the creditors out of whose funds it was adjudged to be paid. Ky., Stat., sec. 489; Davis v. The H. Fellman Co., 23 Ky. Law Rep., p. 1513.

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5. Answer to appellant's seventh proposition or objection:

(a) The charter of the Fire & Police Company clearly shows that it was not organized for such purposes as would bring it within the exception, in the double liability statute (sec. 547), and the proof shows that it was not engaged in such business as comes within the exception. Therefore, its stockholders are liable under said statute. (See Charter Fire & Police Co., Record p. ——). Ky. Stat., sec. 547; Arthus v. Willis, 44 Minn., 409.

(b) In order to come within the exception of the statute a corporation must be organized for the purpose, as stated in its charter, of carrying on exclusively the kind of business mentioned in said exception. Arthur v. Willis, 44 Minn., 409.

6. Answer to appellant's eighth proposition or objection:

(a) The double liability enforced against the stockholders in this action was enforced for the benefit of all of the respective creditors of the corporation in which the respective parties held liable were stockholders. (See Judgment Record, page——

(b) Where a corporation under authority of its charter becomes a stockholder in another corporation it assumes all of the responsibility that an individual assumes by becoming a stockholder and its liability is exactly like that of any other stockholder, and is limited in no way, not applicable to every other stockholder. And when the stockholder's liability is fixed, it is like any other liability or indebtedness. Kentucky Statutes, 547; Minor's Institutes, vol. 2, part 1, pp. 146 and 147.

(c) The property or estate of the corporation is the measure or limit of the satisfaction of its liability that may be obtained from the corporation, but if the debt is not satisfied in full the liability for the balance is not cancelled by the exhaustion of the corporate assets. It remains a liability and the stockholders become responsible therefor under section 547 of the Kentucky Statutes.

Answers to the proposition or objections of the appellees, the Fire & Police and new Gaynor Companies:

1. Where one corporation controls and operates another corporation for illegal purpose, and for the purpose of committing gross frauds upon other persons and the public generally, a court of equity will not assist it in collecting from the corporation so controlled and operated, money advanced or expended by the controlling corporation, in the operation of said corporation, or in furtherance of said unlawful or fraudulent purpose. And this is especially true as between said controlling corporation, (and those claiming through it), and the innocent creditors of the corporation so controlled and operated, when those creditors have been deceived and defrauded by the fraudulent manipulations of

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the two corporations. Beach on Modern Equity Jurisprudence, sec. 78.

Those claiming through said defrauding parties have no better standing in a court of equity, as against these defrauded creditors than have the defrauding parties through whom they claim. However, no one is making any objection in this court, except those defrauding parties themselves, and the appellant, who was the chief beneficiary of, and a party to said fraud.

2. (a) There is no judgment or order in this record holding the Fire & Police Company primarily liable for the debts of the New Gaynor Company. The judgment simply holds it liable as stockholder in the New Gaynor Company to the creditors of that company for its proportion of the unpaid balance of their debts as provided by section 547 of the Kentucky Statutes.

(b) The cross-appeals of the Fire & Police and New Gaynor Companies, like everything else done by them in this case, and in fact since the unlawful and fraudulent combination of said corporation in 1894, is solely in the interest of the appellants.

Other questions involved in the record but not raised in this court by any of the objecting parties to this appeal:

1. The New Gaynor Electric Company did not by reason of the Fire & Police Company owning all of its stock become merged into that company, nor did it become a part or parcel of that company, nor did the Fire & Police Company, as between it and the creditors of the New Gaynor Company, ever become the owner of the New Gaynor Company or its assets. Louisville Gas Co., v. Kaufman-Straus Co., 20 Ky. Law Rep., 1069; Hasselman v. Japanese Bev. Co., 27 N. E., 318, 102 Ind., 153; Cook on Stockholders, (3rd Ed.) secs. 6 and 709; Thompson on Corporations, vol. 5, secs. 6653 and 6655; Exchange Bank v. Mason, &c., 25 S. E. R., 326, (97 Ga. 1.); Newton Mfg. Co., v. White, 42 Ga., 148; Winone & St. P. R. R. Co., v. St. P. & S. R. R., 23 Minn., 359; Humphrey v. McKissick, 140 U. S., 304; Button v. Hoffman, 50 Am. Rep., 161, (61 Wis., 20); Briscoe v. Bank of Com. of Ky., 11 Peters, (U. S.) 323.

2. It being properly shown that the New Gaynor Company was properly organized as a corporation, its legal existence at the time it contracted the debts herein sued on, or at the time of the transaction mentioned in this record can not be questioned in this suit. Walton v. Reilly, 85 Ky., 413; Wright v. Shelbyville R. Co., 17 B. Mon., 5; Gill v. K. & C. Mining Co., 7 Bush, 635; Morawetz on Corporations, vol. 2, sec. 1015; Haselman v. Japanese Bev. Co., 27 N. E. R., 318.

3. The sole owner of said stock of the New Gaynor Company placed shares thereof in the names of certain parties who were

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thus qualified to be and did continue to be officers of said corporation, and said corporation remained and continued to be until the appointment of a receiver herein a separate and distinct corporation with full power to contract and transact business through its officers and agents as empowered by its charter and to incur all the liabilities of a corporation. It was, therefore, not liable on any contract to which it was not a party and its assets can not be taken for the payment of debts contracted by the Fire & Police Company with appellant herein or any one else. Louisville Gas Co., v. Kaufman-Straus Co., 20 Ky. Law Rep., 1069. See other authorities herein above cited under No. 1 this heading.

4. The secret transfer of the machinery, fixtures and assets of the New Gaynor Company to the Fire & Police Company, just prior to the appointment of the receiver herein was void. Sec. 1908, Kentucky Statutes.

5. The Fire & Police Company as stockholder in the New Gaynor Company was liable to the creditors of the New Gaynor Company upon the unpaid balance of their debts, after the distribution of assets of the New Gaynor Company. Kentucky Statutes, secs. 547, 573; Williams v. Nall, 21 Ky. Law Rep., 1526.

6. The ownership of all the stock by a single stockholder does not impose additional or different liability upon the single stockholder than the law imposes on stockholders generally when the stock is held by a number of persons. No reason has been suggested why the rule should not be the same. Louisville Gas Company v. Kaufman-Straus Co., 20 Ky. Law Rep., 1069.

7. Both the Fire & Police and the New Gaynor Companies being insolvent and their assets being in the hands of the court and about to be distributed the liability of the Fire & Police Company as stockholder should be ascertained in this suit, in order to give those to whom it was liable as stockholder a chance to participate in the distribution of its assets.

QUESTION OF POOL OR TRUSTS.

Where two or more corporations or individuals enter into an arrangement for the purpose of regulating, controlling or fixing the price of any merchandise or manufactured article or for defeating by *unlawful and fraudulent and deceptive methods* the provisions of the charters and ordinances of cities in this State, created for the purpose of keeping up a healthy competition on all utilities purchased by such cities, the said combination or arrangement between said parties is illegal and fraudulent. It does not matter that said parties were unable to carry out com-

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pletely their fraudulent purposes. The court looks merely to the intention of said parties. Ky. Stats., sec. 3915; Eddy on Combinations, secs. 297, 589, 590.

Any contract or agreement made for the purpose or intention of carrying out or in furtherance of the unlawful scheme above mentioned becomes part of the original unlawful scheme and is void. Ky. Stat., sec. 3918; Columbia Carriage Co. v. Hatch, 19 Tex. Civ. App., 120; 47 S. W., 288; DeLeon v. Travino, 49 Tex., 88; Pfeuffer v. Mallby, 54 Tex., 454; Brooks v. Martin, 2 Wall., 70; Wergner v. Diering, 65 Tex., 506.

OPINION OF THE COURT BY JUDGE NUNN—AFFIRMING.

The record in this case is voluminous, and we will state only such facts as are necessary for a proper understanding of the questions involved. It appears that the appellant, the Gamewell Fire Alarm Company, is a foreign corporation organized under the laws of the State of New York. The New Gaynor Electric Company is a corporation organized under the laws of this State, and likewise the Fire and Police Telegraph Company. It appears that the New Gaynor Company was organized in June, 1892, and that the Fire and Police Company was organized in July, 1894. That, prior to this last date, the New Gaynor Company was a competitor of the appellant, Gamewell Company, in this territory; they being engaged in the same line of business. The Gamewell Company had three or four agents representing it in Louisville, and they, with the president and other officials of the appellant, conceived the plan and purpose of organizing the Fire and Police Company, and preventing further competition by the New Gaynor Company by purchasing its stock. That since the organization of the Fire and Police Company it has owned all the stock of the New Gaynor Company, and there has not been held, or pretended to be held, any stockholders' meeting of the New Gaynor Company, or the election of any officers thereof. That since that

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date the New Gaynor Company has only had nominal existence, at the dictation of the Fire and Police Company, for the purpose of acting as a pretended competitor in obtaining business, and that it had no independence whatever. That this absorption of the New Gaynor Company by the Fire and Police Company, and holding it out as a pretended competitor for business, was at the instance, dictation, and for the benefit of the appellant. There was placed in the hands of agents of appellant, after the absorption of the Fire and Police Company, enough of the New Gaynor Company stock for the purpose of officering it. These persons continued to hold themselves out as the officers of the New Gaynor Company until the institution of this action. The public had no notice or information whatever that it only had nominal existence, and was in fact owned by the Fire and Police Company, and during this time it contracted debts to the amount of many thousand dollars; and they also transferred to the Fire and Police Company all the personal property belonging to them, by a simple entry on the books of both companies, without notice to any one, and without visible change of ownership of the property. During the existence of the Fire and Police Company, it contracted debts to the extent of many thousand dollars.

The appellant claimed to be one of the creditors of the Fire and Police Company, and in the year 1900 brought this action against it for about $8,000, and also made the New Gaynor Company a defendant, claiming that, by reason of the matters hereinbefore stated, its property and effects were also liable to the payment of the claims of the Fire and Police Company's creditors, and made the necessary allegations for the appointment of a receiver to take charge of the property and assets of both defendant corporations. Appellant also alleged in its petition that the property of

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the defendant corporations was in danger of being lost, wasted, and largely consumed unnecessarily in costs and in enforced sales under executions of their property in behalf of their divers and sundry creditors, and that its interest as a stockholder and creditor, and the interests of all other creditors and stockholders in these defendant companies, would be materially injured unless the court appointed a receiver to take charge of this property, and convert the proceeds thereof, and pay the same into court for equal distribution among their creditors, and that all the creditors of these defendant corporations be enjoined and restrained from instituting or prosecuting any suit against either the Fire and Police Company or the New Gaynor Company. The court, on the application of the appellant, appointed a receiver as requested, and granted the injunction enjoining and restraining the creditors of these corporations from instituting or prosecuting suits except in this action. The New Gaynor Company and the Fire and Police Company filed their answers, admitting and stating that the allegations of appellant's petition were true, and joined appellant in its prayer for relief.

The real appellees in this case are the creditors of the New Gaynor Company and of the Fire and Police Company. The E. A. Kinsey Company, as a creditor of the New Gaynor Company, filed its petition, asking that it be made its answer and counterclaim to appellant's petition and cross-petition against the Fire and Police Company. In these petitions and amended petitions, the Kinsey Company alleges that the creditors of the New Gaynor Company were numerous, and that its interests and the interests of all the other creditors of the New Gaynor Company were identical, and that the questions involved a common and general interest of many persons; that the

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parties were numerous; that it was impracticable to bring all of them before the court within a reasonable time, and that the expense would be great if each and all of the creditors were required to file independent and separate pleas in presenting their claims; and that it (the Kinsey Company) be allowed to sue and defend for the benefit of all the creditors of the New Gaynor Company. The appellee, Southern Electric Company, a creditor of the Fire and Police Company, filed a similar pleading, with like allegations for the benefit of all the creditors of the Fire and Police Company; and the court made an order allowing the Kinsey Company to sue and defend for the New Gaynor Company creditors, and the Southern Company for the Fire and Police Company creditors.

These appellees, the creditors of the two defendant corporations, admitted the attempted transfer of the property of the New Gaynor Company to the Fire and Police Company, and of the purchase by the Fire and Police Company of the New Gaynor Company stock, but say that it was done without any notice to them, or their having any knowledge or information thereof, and for a fraudulent purpose, and with the intent to cheat the creditors of the two companies, and with intent to benefit the appellant. They further allege that the appellant, Gamewell Company, the Fire and Police Company, and the Gamewell Fire Alarm Auxiliary Company (which was a Maine corporation) were, at and during the times mentioned in the petition, organized, and had become a pool, trust, combine, and confederation, for the purpose of regulating, controlling, increasing, and fixing the price of electrical apparatus and appliances and fire alarms in the city of Louisville and community, and for the purpose of fixing, establishing, and limiting the amount and quantity of such articles to be produced and manufactured, bought

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or sold, and that the notes sued on in appellant's petition and transactions and contracts of which they were evidence were made and executed for the purpose of carrying out such illegal combination, pool, or trust, and that the money loaned, pretended to have been loaned, or furnished by the appellant, Gamewell Company, to the Fire and Police Company, as claimed in the petition, was loaned or furnished for such illegal purpose, and in furtherance of such unlawful scheme; that these transactions were in violation of provisions of the statutes of this State, and that the notes and contracts alleged and set forth in appellant's petition, by reason of these facts, were each and all null and void; and that the appellant had no claim against the assets of the Fire and Police Company by reason of such pretended notes and contracts. They further alleged that the assets of the New Gaynor Company and the Fire and Police Company were not sufficient to pay their indebtedness, and would only pay a small pro rata thereon (naming the amount which was also reported by the commissioner of the court), and that the Fire and Police Company owned all the stock of the New Gaynor Company; that the New Gaynor Company was not organized for any of the purposes mentioned in section 547 of the Kentucky Statutes, and that by reason thereof the Fire and Police Company was liable to all the creditors of the New Gaynor Company to the extent of the amount of stock held by it in the New Gaynor Company at par value, in addition to the amount of its stock, not exceeding the total amount of the respective debts of such creditors after the assets of the New Gaynor Company had been exhausted; that the settlement of the affairs of the New Gaynor Company and the Fire and Police Company was then in the hands of the receiver appointed by the court in that action, and they were about to be wound up, and the assets of each company about

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to be distributed, and unless the liability of the Fire and Police Company as stockholder in the New Gaynor Company be determined in that action, and its liability be enforced, great and irreparable injury would be done to the creditors of the New Gaynor Company, and they would be powerless to enforce their respective rights and claims against the Fire and Police Company as such stockholder. They asked the court not to allow the Fire and Police Company its pro rata on the claim it had filed against the New Gaynor Company, but to distribute its part among the other creditors, and give the Fire and Police Company credit on its liability therefor. The appellees also allege in their pleadings that the appellant, Gamewell Company, was a foreign corporation; that its chief office and place of business was in the city of New York, and that appellant was claiming in its action to be one of the creditors of the Fire and Police Company to the extent of about $6,000 and interest, and was seeking to subject the assets of the Fire and Police Company and the New Gaynor Company to the payment of its claims, and that the appellant was the owner in its own right of seventy shares of stock, of the par value of $100 each, in the Fire and Police Company, and that the Fire and Police Company continued to contract and be contracted with until the commencement of this action; that the assets of the Fire and Police Company will only pay a very small pro rata part of the claims of its creditors, and that the larger part of the respective claims can not be satisfied from the assets of the company then in the hands of the receiver of the court; that the Fire and Police Company was not organized for any of the purposes mentioned in section 547 of the Kentucky Statutes of 1899, and that by reason thereof the stockholders of the Fire and Police Company, including the appellant, the Gamewell Company, were each individually

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liable, and responsible equally and ratably, and not one for the other, for all contracts and liabilities of the Fire and Police Company, to the extent of the amount of their stock at par value, in addition to the amount of their stock, and that the Fire and Police Company was organized with a capital stock of $50,000, divided into 500 shares, of the par value of $100 per share, and that 450 shares of this stock was issued to and then owned by various persons, all of whom were unknown to the petitioners, except the appellant, who then held seventy shares of the stock; that, of the stock issued by the Fire and Police Company, the appellant owned seven forty-fifths thereof, and that it was liable for its proportional part to the creditors of the Fire and Police Company, after deducting therefrom the assets in the hands of the receiver, not to exceed the par value of the stock held by it in the Fire and Police Company; that the appellant is seeking to withdraw from this State whatever sum it recovered, if any, against the Fire and Police Company on its claim, and remove it from the State of Kentucky, and out of the jurisdiction of this court; and asked the court not to permit it to do so, and also that it be required to account to the creditors on its stock liability, by virtue of section 547 of the Kentucky Statutes of 1899.

The issues were made up, the proof was heard, and the court adjudged, in substance, as follows: Among other things, it gives judgment to the creditors of the New Gaynor Company for the amount of their respective claims, by confirming the commissioner's report allowing their claims. It gives judgment to the creditors of the New Gaynor Company against the Fire and Police Company as stockholder in the New Gaynor Company upon the balance of these claims of the creditors of the New Gaynor Company remaining unpaid after its assets had been distributed. It gives judg-

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ment to the ordinary creditors of the Fire and Police Company, including the appellant, upon their respective claims. It distributes the assets of the Fire and Police Company pro rata among all of its creditors, including those to whom it was liable as stockholder in the New Gaynor Company, as well as those to whom it was liable by reason of its ordinary transactions. It gives judgment over against the appellant, the Gamewell Company, a foreign corporation, for the amount of its statutory fixed proportional liability as stockholder in the Fire and Police Company to all of the creditors of this company. It subjects to the payment of this last-mentioned judgment against the appellant, so far as they would go, the funds of this non-resident appellant in the hands of the court, to-wit, the pro rata allowed it upon its claim against the Fire and Police Company, and in a subsequent judgment fixed the fee of the attorneys representing the creditors of the two defendant corporations, and allowed them a certain per cent. out of the amounts recovered, but only made those of the creditors responsible who were not represented by other counsel in the preparation and trial of the case.

The appellant asks for a reversal of this case for several reasons. It contends that the court erred in adjudging that the stockholders in the Fire and Police Company were subject to the double liability imposed by section 547 of the Kentucky Statutes of 1899, claiming that it appeared from the charter of the Fire and Police Company that its business was solely and exclusively that of selling agent of appellant, Gamewell Company, in the construction and installation of fire alarm, telegraph, and police alarm telegraph plants, and that by this section of the statutes the stockholders therein were expressly exempt from this double liability. The statute, in so far as is necessary for the determination of

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this question, reads as follows: "The stockholders of each corporation shall be liable to creditors for the full amount of the unpaid part of the stock subscribed for by them, and stockholders of corporations, not organized for educational, religious, charitable or benevolent purposes, or for the purpose of building, constructing or grading turnpikes or bridges, lines of railroad, telegraph or telephone, or developing or improving lands, mines or water-ways, or constructing or operating water, gas or electric plants, or operating for petroleum, natural gas or salt water, shall be individually responsible, equally and ratably, and not one for the other, for all contracts and liabilities of such corporations to the extent of the amount of their stock at par value, in addition to the amount of such stock." The latter portion of section 573 of the Kentucky Statutes of 1899 reads as follows: "After the 28th day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

The Fire and Police Company, having been organized in 1894, before these acts became laws, the stockholders therein were nevertheless liable, because it continued to do business after the law went into effect, and up to the time of the institution of this action, in 1900, provided they are not relieved by the exceptions contained in the statutes, which is the contention of the appellant. We quote so much of the charter of the Fire and Police Company as will aid in determining the question under consideration: "The business which said corporation proposes to carry on shall be the manufacturing and dealing in electric machinery, apparatus and supplies; conducting a general electric business, and exploiting or promoting the fire and police telegraph business; the purchasing or otherwise acquiring stock, bonds or other obligations of

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other corporations, and selling, transferring and disposing of the same, and the doing and performing of all things incident to or connected with or necessary or proper to be done in carrying on the general business herein stated as fully, and to the same extent, as a private person may do." It appears that the statute only exempts stockholders in corporations from double liability when the corporation is organized for educational or other like purposes, or for the purpose of building, constructing, or operating telegraph or other lines, or constructing or operating electric or other plants. It appears that the Fire and Police Company was organized for other purposes than those exempted in the statutes. It was permitted to manufacture and deal in electric machinery and supplies, and to exploit or promote the fire and police telegraph business, to purchase or otherwise acquire stock, bonds, or other obligations of other corporations, and sell, transfer, and dispose of the same, and to do and perform all things incident to or necessary or proper to be done in the conduct of the general business herein stated to the same extent that a private person might do. Even admitting that the proof of appellant shows that the Fire and Police Company only acted as its agent in disposing of its electric supplies this would not relieve its stockholders from the double liability under the statutes. Their liability must be determined from the language of the statutes and its charter, showing the purposes for which it was organized. Any other construction would place a burden upon those dealing with corporations that would be onerous and unjust. Persons dealing with corporations have the right, and it is their duty, to look to their charters for their powers and responsibilities. The statute says, if the corporation was organized for the purpose. It does not say that, if they were engaged in such business, they would be exempt. The case

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of Arthur v. Willius, 44 Minn., 409, 46 N. W., 851, is in point. The Constitution of that State provided that corporations organized for manufacturing purposes should be excepted from the general provisions of the Constitution making stockholders of corporations doubly liable. In the opinion, the court said: "And if the corporation is organized for the purpose, as declared in the articles of association, of carrying on both a manufacturing business and also some other kinds of business not properly incidental to or necessarily connected with a manufacturing business, the mere fact that the corporation never exercised all its corporate powers, and never in fact engaged in or carried on anything but a manufacturing business, will not bring the case within the constitutional exception." The statute excepts such companies as are organized for the construction or operation of electric plants. It does not except all corporations dealing in electric machinery, and buying and selling electric supplies. The field covered by electric machinery and electric supplies is entirely too broad to come within the meaning of the statute. The statute does not except corporations organized for the purpose of conducting a "general electric business." A general electric business would include the manufacture of, the buying and selling of, every electric contrivance or apparatus known to modern science; and there are no exceptions in the statutes in favor of corporations organized for the pupose "of acquiring stocks and bonds or other obligations of other corporations, and selling and transferring the same." There is not an intimation in the charter of the Fire and Police Company that its only business was to be that of acting as selling agent of appellant, Gamewell Company, in selling and disposing of its appliances. Even if the proof sustained this contention, the petition of plaintiff states that it did engage in other business, by buying and dealing in

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stocks of other corporations, to-wit, the New Gaynor Company.

The appellant, the Gamewell Company, contends that even admitting its double liability, under the statutes, as a stockholder in the Fire and Police Company, it was error of the court in so adjudging in this action, for the reasons that the other stockholders in the Fire and Police Company were not made parties to this action, and that it, the sole stockholder before the court in this action, was made responsible upon its statutory liability. From the record it appears that the stockholders in this corporation were unknown to appellees, and the presumption is that the appellant knew the stockholders in the Fire and Police Company, it being one of them; and, if it deemed it necessary that the other stockholders should be made parties to the action, it could have, by appropriate pleadings and proceedings, made them parties, but it made no effort in this direction. Even if this was error, it was not prejudicial to the substantial rights of the appellants. All the stockholders of the Fire and Police Company were responsible for the double liability under the statute quoted, but the liability of each stockholder therein was several and individual, equally and ratably, but not one for the other. The only thing necessary to be done was to ascertain the indebtedness of the corporation, and deduct its assets therefrom, and then ascertain the amount of liability of appellant under the statute quoted. The case of Castleman v. Holmes, 4 J. J. Marsh., 5, was where stockholders in a corporation had been sued. In that case the court said: "The liability of the defendants is several, and not joint. They were properly united in the same action, as we have already seen; but when the rule of apportionment was ascertained, and the cause prepared as to any one, we can not see any sufficient reason why he should not be

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directed to do justice, without delaying until others can be reached." Section 28 of the Civil Code is as follows: "The court may determine any controversy between parties before it, if it can do so without prejudice to others. . . ." The presence and appearance of the other stockholders of the Fire and Police Company in this action could not have, under any possibility, increased or diminished the amount of appellant's liability under the statute quoted.

There can be no question as to the double liability of the Fire and Police Company to the creditors of the New Gaynor Company. It being the sole stockholder and a corporation does not alter the case. The statute says that all stockholders, unless within the excepted class, shall be liable. It does not make any distinction between the stockholding corporation and an individual. Their responsibility under the statutes is the same. Nor does it relieve it of liability because it was the sole stockholder of the New Gaynor Company. It placed stock in the hands of three persons, who were thus qualified to be, and did continue to be, officers of the New Gaynor Company, until a receiver was appointed in this action. This was a fraudulent transaction entered into by the appellant, the Fire and Police Company, and the New Gaynor Company, for the purpose of holding the New Gaynor Company out as a real corporation and as a pretended competitor, when it was in fact only a dummy for the appellant and the Fire and Police Company, with a view to beat the public. This fraud might have been taken advantage of by parties in interest not implicated, but it can not relieve the parties who caused or induced the wrong from liability imposed by their own acts. See Louisville Gas Co. v. Kaufman, 20 R., 569, 105 Ky., 131, 48 S. W., 434, and Louisville Banking

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Co. v. Eisenman, 94 Ky., 83, 14 R., 705, 21 S. W., 531. 1049, 19 L. R. A., 684, 42 Am. St. Rep., 335.

The appellant contends that appellees' pleadings by which they sought to enforce appellant's liability as a stockholder under section 547 of the Kentucky Statutes of 1899 did not constitute a counterclaim, and, being by a defendant against the plaintiff, could not be a cross-petition. We are of the opinion that the facts stated constituted a counterclaim. A counterclaim is defined by section 96 of the Civil Code to be a cause of action in favor of a defendant against a plaintiff, or against him and another, which arises out of the contract or transaction stated in the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action. The purpose of this action, as stated by appellant in the prayer of its petition, was to have the affairs of the insolvent resident corporations placed in the hands of a receiver of the court, and their assets collected, and the same paid to the creditors of the two corporations. The assets of the two corporations consisted, in addition to visible personal property, in debts due them by contract, as well as sums due from stockholders under their liability created by the statutes. It was certainly connected with the subject of this action and the settlement of these insolvent corporations for the appellees to ask the court to require the appellant, a non-resident corporation, to pay and settle the amount it owed under its statutory liability. This would not have been improper even if it had been a resident corporation. The court was right in not permitting appellant, a foreign corporation, to receive its pro rata on its claim, and then leave the State and compel its creditors to seek a foreign jurisdiction for their relief. See Forbes & Bro. v. Cooper &

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Co., 88 Ky., 288, 9 R., 716, 11 S. W., 24; Tinsley v. Tinsley, 15 B. Mon., 459. A nonresident creditor who owns stock in an insolvent Kentucky corporation can not come into a court of equity in this State and subject to the payment of its debts the assets of the insolvent domestic corporation, upon which other creditors have equal claims, and escape from the jurisdiction of our courts with a part of this trust fund in its hands, and thereby lessen the pro rata of other creditors, without first doing equity by paying to the other creditors the amount of its statutory liability to them upon these corporate debts as a stockholder in the insolvent corporation. The other creditors can protect themselves and enforce their rights by a counterclaim

The appellant also objects to the relief granted by the lower court to all the creditors of the insolvent resident corporation other than the appellees Kinsey Company and Southern Company, they being the only creditors to file written pleadings setting forth their claims. The appellant contends that the judgments rendered in behalf of the other creditors are erroneous and should be reversed. All these creditors had a common or general interest in requiring the appellant to account for its statutory liability as a stockholder of the Fire and Police Company, and the creditors were numerous, and it would have been impracticable to bring them all before the court within a reasonable time. For them to appear in the circuit court by written pleadings would have been unnecessary and exceedingly expensive, and the court had, at the beginning of the action, on the application of appellant, enjoined and restrained all these creditors from bringing or prosecuting any action or actions on their claims, except in this action. The Kinsey Company and the Southern Company were authorized by an order of court to prosecute and defend for

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all of these creditors under section 25 of the Civil Code. Under section 432 of the Civil Code, it is provided: "A creditor appearing before the commissioner and presenting his claim becomes thereby a party to the action, and is concluded by the final judgment of the court in allowing or rejecting his claim." In view of the fact that these creditors had filed their claims before the master commissioner as required by statute, and that the Kinsey Company and the Southern Company had prepared and filed pleadings for the benefit of themselves and all the creditors having a common or general interest with them, and had been permitted by an order of court to sue and defend for all, and in view of the provisions of the Code last quoted, and the further fact that these creditors had been enjoined and restrained, at the instance of appellant, from prosecuting actions for their relief except in this action, and the enormous additional expense herein if they had been required to file separate written pleadings in behalf of each of the hundred or more creditors setting forth their claims, it would be a travesty on justice to say that they were not entitled to the relief granted them herein by the lower court.

The appellant further complains of the action of the lower court in allowing a certain per cent. of the amounts recovered to be charged against all the creditors who were not represented by special counsel. Admitting this to be true, it is not a cause for reversal of the judgment, for the reason that the creditors who were required to pay it have not appealed, and the appellant has no interest in the matter, as it does not have to pay any part of it.

Perceiving no error prejudicial to the substantial rights of the appellant, the judgment of the lower court is affirmed.

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CASE 85—ACTION BY V. H. BRAND AGAINST G. C. BRAND, AND OTHERS ON A PROMISSORY NOTE.—NOV. 18.

116 785
125 870

Brand v. Brand, &c.

APPEAL FROM FAYETTE CIRCUIT COURT.

FROM AN ORDER DISMISSING PLAINTIFF'S PETITION, HE APPEALS AND FROM AN ORDER OVERRULING A DEMURRER TO THE PETITION DEFENDANTS APPEAL. REVERSED ON PLAINTIFF'S APPEAL AND AFFIRMED ON DEFENDANT'S APPEAL.

BILLS AND NOTES—ACTIONS—NON-RESIDENTS—JURISDICTION—ATTACHMENT—OBJECTIONS—APPEARANCE—WAIVER—FOREIGN JUDGMENTS—CONCLUSIVENESS—DETERMINATION—LIMITATION.

1. Civil Code, section 194, provides that a plaintiff may at or after the commencement of an action, have an attachment against the property of the defendant as a security for the satisfaction of any judgment he may recover against a defendant who is a non-resident of the State. HELD, that where a non-resident defendant had property within the State, a circuit court of a county where such property was located acquired jurisdiction of the defendant to the extent of the value of such property by the levy of an attachment thereon.

2. Where a non-resident sued by attachment appeared and demurred to the petition for alleged want of jurisdiction of the court, and, after his demurrer was overruled, he appeared and pleaded to the merits, the court thereby acquired jurisdiction of his person.

3. Constitution United States, article 4, section 1, requires full faith and credit to be given in each State to the judicial proceedings of every other State, and Rev. St. U. S. sec. 905 (U. S. Comp. St., 1901, p. 677), provides that the judgment of any court of any State shall have the same force and effect in any other State as in the State where rendered. HELD, that whether a judgment dismissing an action on a note in New York on the ground that it was barred by limitations of that State was a determination on the merits of the case, and therefore barred another action on the note in Kentucky, depended on the effect which would be given to such judgment by the courts of New York.

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4. Plaintiff held a note against defendant, who was a resident of New York, and for the purpose of collection only assigned it to G., who brought suit thereon in New York, in which the court directed judgment for defendant on the ground that the action was barred by the New York statute of limitations. Thereafter plaintiff brought suit on the note in Kentucky, and defendant pleaded the New York judgment as a bar. Held, that since, under the decisions of New York, a judgment based solely on the statute of limitations is held to affect the remedy only, and not the cause of action, such judgment was no bar to plaintiff's action in Kentucky, where a different statute of limitations prevailed.

GEO. L. EDWARDS AND MORTON, WEBB & WILSON FOR PLAINTIFF. BRECKENRIDGE & SHELBY AND H. A. HEROLD, FOR DEFENDANT. (NO BRIEFS, RECORD MISPLACED.)

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM.

The appellant, Virginia Brand, brought this suit against the appellees in the Fayette circuit court to collect the following promissory note:

"$4,999.91.

"Kirkwood, Mo., March 1, 1886.

"Twelve months after date we promise to pay to the order of Virginia H. Brand, forty-nine hundred and ninety-nine dollars and ninety-one cents for value received. Negotiable and payable without defalcation or discount, and with interest from date at the rate of eight per cent. per annum. Payable at the St. Louis National Bank, St. Louis, Mo. BRAND & HOLTZMAN."

The following indorsements appear on the back of the note:

"Sept. 13, 1886.

"Allowed on this note against the estate of Brand & Holtzman $5,123.19. Y. PITMAN,

"Ass'nee of Brand & Holtzman."

"Paid on this note, the first dividend of twenty per cent., being $1,042, Sept. 30, 1886. Y. PITMAN, Assignee."

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"Paid Jan. 7, 1887, $196.48. Y. PITMAN, Assignee."

She alleged in her original and amended petition that the defendant. George G. Brand, H. H. Herold, and Ella Fletcher Brand were nonresidents of the State of Kentucky, and citizens of the State of New York; that the defendant George C. Brand was a son of W. M. and H. W. Brand, deceased, and that he owned an undivided interest in certain specifically described tracts of real estate in Fayette county, Ky., in the city of Chicago, Ill., and lands in the State of Texas, and also in a trust fund—all of which was in the possession of and controlled by the defendant Shropshire; that after the creation of her debt, on the 15th of December, 1900, George C. Brand had, in fraud of her rights as creditor, conveyed to the defendant Herold, without valuable consideration, all of his interest in the trust estate for the use and benefit of Ella Fletcher Brand. A warning order was issued against all of the nonresidents, and a corresponding attorney appointed to notify them of the pendency of the suit and the objects thereof. She prayed for a personal judgment against the defendant George C. Brand for a cancellation of the conveyance made by him to Herold, and sued out a general attachment, which was levied upon the real and personal estate located in Fayette county; and she had a garnishee served on Shropshire as testamentary trustee, and called on him to answer, and state the amount and aggregate of the trust funds in his hands; and that the interest of George C. Brand should be applied to the payment of her debts. She also set out the provisions of the will of W. M. Brand creating the trust, which are as follows: "It is my will and I do hereby direct that my executrix and executors shall have the right, and I do hereby empower them, or those of them who qualify as such, to sell and dispose of, and convey any part of my

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real or personal estate, and to invest the same as a productive fund in any other estate; and I do direct that the profits of my estate shall be left in the hands of my executrix and executors to rear and educate my children, or so much thereof as shall be sufficient and necessary for the support of my wife for life, or during her widowhood; and that in distributing it to my nine children to each a ninth part, a due proportion of each part shall be retained out of each ninth to support my wife for life, or during her widowhood. . . . At the death of my wife, the estate devised to her for life is to be equally distributed as the residue of my estate devised to my children." She asked a settlement of the trust, and an ascertainment of the interest of George C. Brand, and that it be applied to the payment of her debt.

The deendant George C. Brand filed a special demurrer to the petition as amended on the ground that the Fayette Circuit Court had no jurisdiction of the defendants, or to grant the relief sought by the petition. The special demurrer was overruled, and he then filed an answer, in which, after denying the jurisdiction of the court, he alleges that the plaintiff assigned and transferred and delivered the note sued on to one Mordecai L. Gotthelf; and that in October, 1899, Gotthelf instituted an action thereon in the Supreme Court of the State of New York, alleging that he was the owner thereof, and that it had been indorsed, transferred and delivered to him for value, and prayed for judgment thereon against the defendant George C. Brand, for the amount thereof; that in answer to this petition George C. Brand stated that the note had been paid, and also pleaded and relied upon the New York statute of limitations; and that in this proceeding a judgment upon the merits of the controversy had

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been rendered upon the verdict of a jury in his favor, which had never been appealed from, and was in full force and effect, and pleaded this judgment as a conclusive bar to the prosecution of this suit. Plaintiff, in her reply, admits that in October, 1899, the note sued on had been indorsed and delivered to Gotthelf, but alleges that this transfer was solely for the purpose of enabling Gotthelf to collect it; admits that a trial was had in the New York court, before a jury, on the 20th of February, 1900, and that the judgment was rendered solely upon the plea of the statute of limitations, and denies that the judgment in that action was rendered upon the merits of the petition; "that under the laws of the State of New York the statute of limitations relied upon by the defendant in his answer and filed in said action instituted in the State of New York was not a defense to said action upon the merits thereof; . . . that under the laws of the State of New York the judgment rendered in said action in the State of New York upon the aforesaid plea of limitation neither impaired nor extinguished the right or cause of action set up or alleged in said suit. The only effect of said judgment in said suit under the laws of the State of New York was to deny the plaintiff in said action the remedy sought for the enforcement of the cause of action set up by the plaintiff in said suit, and that said judgment under the laws of the State of New York was no bar to another suit in said State upon the same cause of action; that the effect of such a judgment under the laws of the State of New York was to deny to the plaintiff in a second suit in the same State the remedy denied him in the first suit." A copy of the record in the New York suit was filed as an exhibit with the reply. Whereupon the defendant George C. Brand filed a general demurrer to the reply as amended, which was sustained by

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the court, and, the plaintiff declining to plead further, judgment was entered dismissing her petition, and discharging her attachment; to which action of the court the plaintiff excepted, and prayed an appeal to this court. The defendant George C. Brand also prosecutes a cross-appeal from the judgment of the circuit court overruling his special demurrer to the jurisdiction of the court.

The first question to be determined is whether the Fayette circuit court had jurisdiction by attachment and constructive service of process upon the defendant to subject the property levied on by the attachment to the payment of the claim of plaintiff. At least a part of the property sought to be subjected is located in Fayette county. Section 194 of the Civil Code provides that: "The plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant, including garnishees as is provided in section 227, as a security for the satisfaction of such judgment as may be recovered, against a defendant who is a nonresident of this State." The right of a State through its tribunals to subject property situated within its limits owned by nonresidents to the payment of demands against them, and that this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled, is too well established to admit of argument. Thus, in Picquet v. Swan, 5 Mason, 35, Fed. Cas. No. 11,134, Mr. Justice Story said: "Where the party is within the territory, he may justly be subjected to its process, and bound personally by the judgment pronounced" against him. "Where he is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory process by the local laws may by attachment go to compel his appearance, and for his default to appear

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judgment may be pronounced against him, such judgment must upon general principles be deemed only to bind him to the extent of such property, for the reason that, except so far as the property is concerned, it is a judgment *coram non judice.*" In Boswell's Lessee v. Otis, 9 How., 336, 13 L. Ed., 164, the court said: "Jurisdiction is acquired in one of two modes: First, as against the person of the defendant, by a service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem.*" In Cooper v. Reynolds, 10 Wall., 308, 19 L. Ed.. 931, and Pennoyer v. Neff, 95 U. S., 714, 24 L. Ed., 565, this question was fully considered, and the conclusion reached that a State having within her territory property of a nonresident might appropriate it to the satisfaction of claims against him. Numerous authorities could be advanced in support of this view, but we deem the above sufficient. Besides, in this case the defendant George C. Brand did not elect to stand by his demurrer, but entered his appearance, and plead to the merits of the controversy. We think, therefore, that the court necessarily had jurisdiction of him.

It is conclusively shown by the testimony that the assignment of the note by the plaintiff to Mordecai L. Gotthelf was solely for the purpose of collection, and was done upon the advice of her attorney in New York City, and that it still remains the property of the plaintiff. It is also conclusively shown by the copy of the record of the pleadings, instructions, and testimony in the New York

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suit that the verdict of the jury was rendered pursuant to a peremptory instruction of the court to find for the defendant upon the sole ground that it had been shown that the defendant Brand at the time of the commencement of the action was and had for more than six years prior thereto been a resident and inhabitant of the State of New York, and that under the statute of limitations in that State the action could not be maintained. Besides, it appears that the defendant George C. Brand upon the trial admitted the execution of the note, and that he was entitled to no credits other than for the payments made by his assignee. The question is squarely presented as to whether the judgment rendered for the defendant by the Supreme Court of New York upon the plea of the statute of limitations in that State extinguishes the causes of action and is a bar to another suit upon the same cause of action in another jurisdiction which does not have the same statutory limit in which such action may be commenced. This contention is mainly based upon section 1 of article 4 of the Constitution of the United States, which provides: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof;" and upon section 905 of the Revised Statutes of the United States (U. S. Comp. St., 1901, p. 677), wherein it is provided that the judgment of any court of any State in the Union shall have the same force and effect in any other State as in the State where rendered. The effect of this provision of the Federal Constitution and the statute rendered pursuant thereto was fully considered by this court in Williams v. Preston, 26 Ky., 600, 20 Am. Dec., 179, and more recently in Calloway

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v. Glenn, Trustee, 105 Ky., 651, 20 R., 1447, 49 S. W., 440, in which the conclusion was reached that the judgments and decrees of a sister State were entitled to precisely the same effect in this State as they would have had by the laws of the State wherein they were rendered. It follows that if the judgment relied on in this case would be conclusive of the plaintiff's cause of action on its merits in the State of New York it must be conclusive here.

Counsel for appellant contends that the courts of New York hold that the statutes of limitation of that State operate exclusively upon the remedy, and do not in any respect affect the cause of action, and that a judgment for defendant rendered upon the plea of the statute of limitations in one jurisdiction is not a bar to another suit upon the same cause of action elsewhere, and that this holding of the New York courts is the generally accepted construction of the statute of limitation both in England and in the various States of the United States; and in support of this contention he has collated in his brief numerous authorities, to which our attention has been directed. First is the case of Whittemore v. Adams, 2 Cow., 626, a case decided by the Supreme Court of New York. The action was upon divers promissory notes, the pleadings admitting the indebtedness. Under the laws of New York the person of the debtor might be taken under execution, and imprisoned, etc. To avoid the imprisonment in consequence of a judgment, the defendant pleaded an act of the District of Columbia for the relief of insolvent debtors, by complying with the provisions of which the person of said debtors were exempt from imprisonment. The defendant alleged prior imprisonment and discharge under said act. And the court, in passing upon the issues thus joined, said: "The defendant relies upon an insolvent discharge granted pursuant to

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an act of Congress of the United States for the relief of insolvent debtors within the District of Columbia. 6 U. S. Laws (Old Ed.), p. 294. The tenth section of that act (Id., p. 300), declares the effect. If a debtor is arrested for any debt contracted before the discharge, the court issuing the process, or a judge, are to release him on common bail. . . . Giving to this discharge all the effect which can possibly be claimed under the act of Congress, it does not operate upon the contract, but merely upon the mode of enforcing it. It is a personal discharge of the defendant, nothing more, and must, from its very nature, be confined in operation to the District of Columbia. The *lex loci contractus* does not apply. Imprisonment is not a part of the remedy, not of the contract. . . . The defendant can not be imprisoned there, but it does not follow that he is exempt from imprisonment in this State. The same principle has been repeatedly acted upon by this court in relation to the statutes of limitation of adjoining States (Nash v. Tupper, 1 Caines, 402, 2 Am. Dec., 197), even where the contract arose and both parties reside there. And a long and unbroken series of decisions has denied any effect to these personal discharges beyond the boundaries of the State where they are granted, upon the principle that the statutes upon which they are granted are inapplicable, as part of the *lex loci contractus*, but constitute a part of the *lex fori* merely. The case principally relied upon by the defendant's counsel is Hick's v. Brown, 12 Johns., 142. That case gave effect to a New Orleans discharge, which extended both to the person and the contract of the debtor; and the principle of that case was again recognized by this court in Sherrill v. Hopkins, 1 Cow., 103. Both cases are plainly distinguishable in this particular from the present. They go beyond imprisonment, the mere remedy to the contract

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itself. . . . Nor is this discharge operative within the clause of the Constitution which declares that full faith, credit and effect shall be given to the judicial proceedings of another State." This case was approved in Stern, &c., v. Schlesinger (City Ct. N. Y.), 5 N. Y. Supp. 1, and the following is taken from the statement of facts in the latter case: "An order of arrest was granted herein, and defendant's motion to vacate on the grounds that having been arrested in Michigan on the same cause of action, he could not be again arrested on it in New York, and that the action being on a foreign judgment, the cause of action was merged, and there could be no arrest, was denied. Defendant now moves to vacate the order on affidavits showing that the defendant took the 'poor debtor's oath' in Michigan, and was there discharged from imprisonment, after opposition offered by the creditor, and that the effect of such discharge under the laws of Michigan is to forever exempt the defendant from imprisonment on the same cause of action." In the course of the opinion the court said: "The poor debtor's act of Michigan (2 How. Ann. St., c. 309) is a beneficent statute, under which impecunious debtors may be relieved from imprisonment. The discharge does not affect the debt, which remains unimpaired, but terminates the imprisonment, and provides that the debtor, after being so discharged, shall be forever exempted from arrest or imprisonment for the same debt.' The effect of the discharge under the enactment was to prevent a second arrest in that State for the same debt. The act can have no greater effect, for it has no extraterritorial force, and can not be invoked here. True, the creditor opposed the discharge, but this circumstance adds nothing to the extraterritorial operation of the statute. If the proceedings under the act in question had discharged the

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debt or obligation, and the creditor had entered the foreign jurisdiction and there contested the discharge, a different question would have been presented; for a debt once lawfully extinguished in Michigan by payment or operation of law is, as a rule, discharged everywhere. A discharge from debts granted under the laws of one State may be inoperative on the citizens of other States, unless the obligations are to be performed in the place where the discharge was granted. Yet where such citizens submit themselves to the jurisdiction of the foreign law by voluntarily becoming parties to the proceedings there pending, they may be concluded by the adjudication made. Soule v. Chase, 30 N. Y., 342. But the application made in Michigan did not affect the debt. It merely affected the remedy provided for its enforcement in that State, and the discharge from imprisonment granted therein merely put an end to the right to imprison the debtor within that jurisdiction. Imprisonment is no part of the contract, and, notwithstanding the discharge in Michigan, the debt remained unimpaired, and the rights to enforce it in other jurisdictions, according to the laws thereof, followed the obligation as a legal incident, for the *lex fori* governs the remedy. . . . In other words, the remedial statutes of other States in no manner affect or concern us in the manner of executing our laws. Each State enforces its provisional remedies according to its own peculiar methods. Obligations are determined and contracts construed with reference to the law of the place where they were made or are to be performed. But when we come to remedies it is another thing. . . . A discharge from imprisonment relates only to the remedy, and not to the contract or obligation. It is limited in its object and local in its effect, having no force beyond the boundary of the State where it

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was granted, and the creditor is entitled to all the remedies provided by the *lex fori*."

These cases announce the rule that the *lex fori* always governs the remedy, and that judgment based upon statutes which operate simply upon the remedy do not affect the cause of action. In the case of the Bank of the United States v. Donnally, 33 U. S. 361, 8 L. Ed., 974, the suit was upon a promissory note executed in Kentucky, and payable there, on which suit was commenced in the District Court for the Western District of Virginia. Among other defenses, the defendant pleaded the statute of Virginia in bar of the action. In consideration of this defense the counsel for the plaintiff urged the following for the consideration of the Supreme Court of the United States: "Mr. Sergeant, in reply, urged upon the court the propriety of leaving to the plaintiffs in error their remedy on the note should a suit be brought upon it in the State of Kentucky or elsewhere. If the court should consider the limitation law of Virginia as governing the case, they would apply that law, by their judgment, to the remedy which had been sought in this suit in Virginia, and not give such a judgment as would impair the plaintiff's right elsewhere. He contended that the sole ground of the cases cited for the defendant was the effect of the statutes of limitation upon the remedy. They do not decide that the right to the debt is destroyed by the lapse of time." In response to this question so urged upon the consideration of the court, Justice Story (on page 370) said: "As the contract upon which the original suit was brought was made in Kentucky, and is sought to be enforced in the State of Virginia, the decision of the case in favor of the defendant upon the plea of the statute of limitations will operate as a bar to a subsequent suit in the same State; but not nec-

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essarily as an extinguishment of the contract elsewhere, and especially in Kentucky. But a general judgment in favor of the defendant upon his demurrer to the declaration (it is supposed) may, as a judgment upon the merits of the claim, have a very different operation as *res adjudicata* or final judgment. Hence there arises a very important consideration as to the correctness of the judgment upon that demurrer. It has accordingly been argued at large by counsel for the bank as vital to the rights as well as the remedies of the bank in other States. We are of the opinion that the fourth and fifth counts are upon the general demurrer good, and that the judgment of the court below was as to them erroneous. . . . Upon the whole our opinion is that the judgment upon the demurrer by the defendant to the fourth and fifth counts ought to be reversed; in all other respects it ought to be affirmed. But, as the plea of the statute of limitations is a good bar to all the counts, the judgment of the court below that the plaintiff's take nothing by their writ is right, and ought to be affirmed with costs." On the same page then (loc. cit., 374) is found the form of the judgment directed to be entered by the court, which reversed the judgment entered "on the merits," or professedly on the merits, and the judgment is made to show upon what ground it is based, to-wit, that it went upon the plea of the statutes of limitations. In the case of Brent v. Washington Bank, 1 Pet., 596, 9 L. Ed., 547, in discussing this question, Judge Baldwin, speaking for the court, said: "But they allege that the debt is extinguished by the verdict in their favor rendered on the plea of the statutes of limitations. In Bank of the United States v. Donnally, 8 Pet., 361, 8 L. Ed., 974, this court laid it down as an established principle that the act of limitations operated only to bar the remedy, not to extinguish

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the right or cause of action; and that a judgment on a plea of the statute was only to bar the remedy on a contract when sued for in Virginia, as the limitation act of that State embraced the one declared on; but did not operate to extinguish the contract when sued on elsewhere, or in Kentucky, where by the *lex loci* it was not affected by any limitation. We can not take this case out of the established rule. The legal remedy is barred, but the debt remains as an unextinguished right; and the bank, when called in a court of equity, may hold any equitable lien or other means in their hands till it is discharged." In Jacobs v. Marks, 182 U. S., 591, 21 Sup. Ct., 865, 45 L. Ed., 1241, the court had before it the question whether a judgment rendered in the court of Michigan had received full faith and credit in the courts of Illinois, and the court said: "It is a general rule that a plea of former recovery, whether it be by default, verdict, or demurrer, is a bar to any new action of the same or the like nature for the same cause. This rule conforms to the policy of the law which requires an end to the litigation after its merits have been determined. But there must be at least one decision on the right between the parties before there can be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit." In Minor on Conflict of Laws, sec. 210, the author says: "It may be observed in passing that a judgment for the defendant upon the plea of the statutes of limitation will not prevent another suit upon the same transaction elsewhere." Mr. Foote, in his work on Private International Jurisprudence (page 512), in speaking of laws which limit the time for the enforcement of a civil remedy, says: "So exclusively is such a law a matter of procedure that a foreign judgment declaring that a claim is barred by a local statute of limitation is no bar

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to an action in the tribunal of another State the laws of which fix a longer term of limitation of suit in the original cause of action. In such a case the maxim, '*Nemo bis debit vexari pro eadem causa*,' does not apply, the plea upon which the foreign judgment has been given not going to the merits of the cause of action." Mr. Dicey, in his work on Conflict of Laws (page 422), says: "A foreign judgment in favor of the defendant in the foreign action is a complete answer to any proceedings here for the same matter by the plaintiff in such action, provided the judgment be final and conclusive on the merits; but it is not an answer to an action in England, if it be merely an interlocutory judgment, or a judgment which, though it decides the cause finally in the country where it is brought, does not purport to decide it upon the merits, if it is given in favor of the defendant on the ground that the action is barred by the statutes of limitations."

Whilst the adjudication of courts of last resort in the United States on this question are not entirely uniform, we think it can not be denied that the overwhelming weight of authority is to the effect that a judgment rendered on the plea of the statute of limitations in one jurisdiction does not bar another jurisdiction having a different statute of limitation, and this is undoubtedly the rule in New York. It follows, therefore, that the only effect which we can give the New York judgment is that it conclusively establishes that the plaintiff had under the laws of that State no remedy for the enforcement of her claim, but that that judgment did not extinguish her "cause of action" in the courts of Kentucky, where a different statute of limitation prevails.

For reasons indicated, the judgment is reversed on appeal of the plaintiff, and affirmed on cross-appeal of de-

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fendant, and cause remanded, with direction to overrule defendant's demurrer to plaintiff's reply and for other proceedings consistent with this opinion.

CASE 86—APPLICATION OF ANSE WARNER TO MADISON COUNTY COURT FOR A FERRY LICENSE AND ALSO PROCEEDING IN THE CLARK COUNTY COURT BY OTHER PARTIES FOR LICENSE FOR SAME FERRY.—NOV. 6.

Clark County Court, &c., v. Warner.

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APPEAL FROM MADISON CIRCUIT COURT.

PROHIBITION GRANTED ON THE PETITION OF ANSE WARNER TO RESTRAIN CLARK COUNTY COURT FROM GRANTING THE FERRY LICENSE, AND CLARK COUNTY COURT AND OTHERS APPEAL. AFFIRMED.

FERRIES—LICENSE—COURTS—CONCURRENT JURISDICTION—WRIT OF PROHIBITION.

1. Notice of an intended application for a grant of a ferry privilege is equivalent to service of process on all persons interested.

2. On an application to a county court for a ferry privilege the statutory notice was given, and another who sought the privilege claimed under a transfer from a corporation which claimed the land on the other side of the river where the ferry would land. After appeal to the circuit court the corporation appeared and presented a written transfer, and it was made a party. The court continued the cause for certain evidence. Held, that pending such cause the county court of the county in which the ferry would land on the other side of the river had no jurisdiction to entertain an application by the corporation for a ferry privilege identical with the one already sought.

3. By virtue of Civil Code, section 479, defining prohibition to be an order of a circuit court to an inferior court, prohibiting it from proceeding in a matter without its jurisdiction, the circuit court, in which the application for a ferry privilege was pending, had authority to issue prohibition to the court entertaining the application of the corporation.

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PENDLETON & BUSH, FOR APPELLANTS.

QUESTIONS DISCUSSED AND AUTHORITIES.

1. The Clark county court had jurisdiction, and the writ of prohibition was, therefore, improperly granted. If error was committed, the remedy was by appeal, and not by writ of prohibition. Arnold and Parrish v. Shields, 5 Dana, 18; Scott v. Tully, 20 Ky. Law Rep., 1734; Bank Lick Turnpike Co., v. Phelps, 81 Ky., 613; Goldsmith v. Owen, 95 Ky., 420; Walcott v. Wells, 37 Amer. St. Rep., 480, and 9 L. R. A., 59; City of Owenboro v. Sparks, 18 Ky. Law Rep., 269; Schobarg v. Manson, 22 Ky. Law Rep., 1892; 23 Amer. & Eng. Ency., (2 Ed.), 200, 210, 222; 16 Ency. Pl. & Pr., 1125, 1126; Stahl v. Brown, 84 Ky., 325.

2. The appellant could not be denied jurisdiction on a plea entered by appellee of a former suit pending; or, by reason of a special demurrer to its jurisdiction, under sub-section 3, section 79, of the Civil Code, because *the parties were not the same.* Sub-sec. 3, sec. 92, Civ. Code; Moore's Adm'r., v. Sheppard, 1 Met., 100; Gist v. Shean, 8 Ky. Law Rep., 509; Adams v. Gardiner, 13 B. Mon., 198; Mary Bashee, etc., v. James Boyce, 7 L. R. A., 272; 1 Ency. Pl. & Pr., 23.

3. The Madison circuit court had no jurisdiction over appellant. Stahl v. Brown, 84 Ky., 325.

4. The temporary preventive order was made by the court, before any notice of the motion for the writ had been given and before any motion was pending, and was, therefore, void. Code, secs., 476, 445, 474; City of Cynthiana v. Board of Education of Cynthiana, etc., 21 Ky. Law Rep., 731,

BECKNER & JOUETT, ATTORNEYS FOR APPELLEE.

QUESTIONS DISCUSSED.

1. Has a circuit court which has first acquired jurisdiction of an application for a ferry privilege by appeal from the county court, power to prohibit the county court of another county from hearing and determining a motion to grant the same privilege to the privy of a party before it, said privy having full notice of the application still pending in the first named court?

2. When the jurisdiction of two courts is concurred or coordinate, is not the jurisdiction of the one before which it first comes *exclusive* to the extent that the other court can have no jurisdiction so long as the matter is pending in the court that first acquired control?

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AUTHORITIES CITED.

Sasseen v. Hammond, 18 B. Mon., 673; Constitution, (state), 110; Hindman v. Toney, 97 Ky., 413; 5 Bacon's Abridgement, 647; 3 Blackstone, 112; 2 Bouvier's Law Dict., title, Prohibition; Whatton's Law Dict. title Prohibition; Havemeyer v. Superior Court, 10 L. R. A., 646; State v. Aloe, 47 L. R. A., 399; N. & W. Ry. Co. v. Pin Coal Co., 41 L. R. A., 415; Bullard v. Thorpe, 25 L. R. A., 606; Hughes v. Recorder's Court, 4 L. R. A., 864; Weaver v. Toney, 21 Ky. Law Rep., 1157; McCann v. City of Louisville, 23 Ky. Law Rep., 558; State v. Com. of Roads, 12 Am. Dec., 602; Civil Code, 479; Kentucky Statutes, secs. 1803, 1805, 1806; Am. & Eng. Ency. Law, (1st. ed.), vols. 12 292; Wells on Jurisdiction of Courts, 156; Ober v. Gallagher, 93 U. S., 199; Brooks v. Delaplaine, 1 Md. Ch. Dec., 351; Stahl v. Brown, 84 Ky., 328; Combs v. Sewell, 23 Ky. Law Rep., 172; Taylor v. Taintor, 83 U. S., 370; Hawes v. Orr, 10 Bush, 439; Mason v. Chambers, 4 J. J. M., 410; Massie v. Com., 90 Ky., 486.

OPINION OF THE COURT BY JUDGE SETTLE—AFFIRMING.

The appellee, Anse Warner, on May 6, 1901, entered motion in the Madison county court for a license to operate a ferry across the Kentucky river between the town of Ford, in Clark county, and a point where the Stony Run and Ford turnpike ends, on the opposite side of the river, and on his land in Madison county. The motion was based upon the statutory notice, a copy of which was duly filed at the time. On the same day, and in the same court, a like motion was made for the ferry privilege, at the same place, by one J. C. Richards, who claimed to be the grantee of the Ford Lumber & Manufacturing Company, which owned the land on the Clark county side of the ferry, and this claim was confirmed by J. M. Thomas, the president of the company, by written grant, which he filed in open court. The county court upon the trial of the two motions rejected the application of appellee, and granted the ferry license to Richards. Appellee thereupon took an appeal

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from the judgment of the Madison County Court to the circuit court of that county, and the latter court, on June 29, 1901, upon the hearing of the appeal, rendered judgment reversing the county court, and deciding that the appellee was entitled to the ferry privilege instead of J. C. Richards. So much of the judgment as it is necessary to make a part of this opinion is as follows: "The court being advised, is of the opinion that the Madison County Court had no power, under the evidence in this case, to grant a ferry privilege to J. C. Richards, but that Anse Warner was and is entitled to the grant of such privilege absolutely, if it should turn out that there is a public highway at the point of landing upon the Clark county side; but, if there is no such public highway upon the Clark county side, the said Warner is entitled to said grant only after the right of way from the point of landing on the Clark county side to a public highway shall have been properly condemned and paid for as required by law." The same judgment continued the cause until the next term of the court for the introduction of evidence on the question as to whether or not the landing on the Clark county side of the river is an established highway, and for such other proceedings as might to the court be deemed proper after the determination of that question. At a subsequent term of the circuit court the appellee filed an amended statement, in which it is averred that the ferry sought to be established lands upon the Clark county side of the Kentucky river at and upon one of the streets of the town of Ford, but that the Ford Lumber & Manufacturing Company is claiming to own the ground upon which the ferry landing will be located in Clark county, for which reason it was made a party to the proceedings, though it is doubtful whether such a

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step was necessary, as the company had practically made itself a party by appearing in court as the grantor of Richards, and filing the writing confirming his right to the ferry landing on the Clark county side of the river. But a little over a month after the reversal of the judgment of the Madison county court by the circuit court of that county, with full knowledge of the fact that the appellee, instead of Richards, had been granted a license by the circuit court to operate the ferry at Ford, and that the proceeding was still pending in the circuit court, to the end that appellee's right to the ferry landing on the Clark county side of the river might be adjudicated, the Ford Lumber & Manufacturing Company filed notice and moved the Clark County Court to grant it a license to establish a ferry at the same point on the Kentucky river. The motion in the Clark County Court was resisted by appellee only for the purpose of objecting to the jurisdiction of that court, and to the extent of setting up the pendency of the proceedings in the Madison Circuit Court, the fact that the ferry sought to be established by the Ford Lumber & Manufacturing Company in Clark county was the same that had been granted appellee by the Madison Circuit Court, the further fact that the Ford Lumber & Manufacturing Company had been made a party to the proceedings in the Madison Circuit Court, and in addition that appellee had filed in the Madison Circuit Court a petition for a writ of prohibition to be directed to the judge of the Clark County Court forbidding him to proceed further in the hearing of the application for a ferry privilege made by the Ford Lumber & Manufacturing Company. These objections were all overruled, and a continuance of the case refused by the Clark County Court. On the same day a temporary writ of prohibition was granted by the judge of the Madison Cir-

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cuit Court, which was duly served on the judge of the Clark County Court upon the morning of the following day, after he had resumed the hearing of the motion of the Ford Lumber & Manufacturing Company in his court. Subsequently the appellants Clark County Court and J. H. Evans, county judge of Clark county, waived notice, and entered their appearance to the petition and motion for the writ of prohibition, moved to set aside the order granting the writ, and filed special and general demurrers to the petition, which motion and demurrers were overruled, and judgment duly entered making the writ of prohibition absolute, and from that judgment this appeal is prosecuted.

It is conceded by the appellants that the ferry privilege sought at the hands of the Clark County Court by the Ford Lumber & Manufacturing Company is for operating the same ferry the right to which was granted to appellee by the Madison Circuit Court on the appeal from the Madison County Court in the controversy between him and J. C. Richards, and that the Ford Lumber & Manufacturing Company, applicant in the Clark County Court for the ferry privilege, had granted to J. C. Richards the right to occupy and use its land on the Clark county side of the river for a landing and passway to the ferry. Appellants do not deny that if the Clark County Court had no jurisdiction of the motion pending there for the ferry privilege to the Ford Lumber & Manufacturing Company, then the judgment appealed from was correct. For the appellee it is insisted that as the Madison County Court on the original motion, and the Madison Circuit Court on appeal, first acquired jurisdiction of the matter of the ferry right, no other court could consider the question of granting a ferry privilege at the same place until the proceeding then pending in the Madison Circuit Court had been determined, and especially that this is true in view of the fact that

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a judgment had been rendered by the Madison Circuit Court granting the ferry privilege in controversy to the appellee. In other words, it is contended that as the Kentucky river at the point where it is sought to establish the ferry is the dividing line between the counties of Clark and Madison, the jurisdiction of their respective county courts is concurrent; that is, the county court of either county may grant a ferry license at the point in controversy, but that where one of these courts assumes jurisdiction for that purpose the other can not thereafter do so, for the reason that the court first acquiring jurisdiction will retain it, to the exclusion of all other tribunals, until a final adjudication in reference to the subject of the action results.

We must sustain this contention of the appellee, as it seems to us to be sound in principle and consonant with reason. Indeed, no doctrine is better settled than that, "where two courts have concurrent jurisdiction, whichever court first acquires jurisdiction of a case will retain it throughout." Am. & Eng. Enc. of Law (1st Ed.), vol. 12, p. 292; Wells on Jurisdiction of Courts, 156; Ober v. Gallagher, 93 U. S., 199, 23 L. Ed., 829.

In Hawes, &c., v. Orr, &c., 10 Bush, 439, this court said: "We recognize the doctrine that the court first acquiring jurisdiction has a right to go on until it has performed its office in reference to the subject-matter in litigation, and will not allow itself to be ousted of its jurisdiction, or permit the thing in lite to be wrested from it so that it can not execute its judgment." Manifestly, this doctrine should be applied to the case at bar. The subject-matter of the proceedings in each of the two courts is the same; the parties or privies the same. At any rate, if the Ford Lumber & Manufacturing Company was not actually made a party to the proceedings in the Madison County Court, it

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is well settled that "notice of an intended application for a grant of a ferry privilege is equivalent to service of process on all persons interested." Stahl v. Brown, 84 Ky., 328, 8 R., 279, 1 S. W., 540; Combs v. Sewall, 23 R., 169, 60 S. W., 169.

The statutory notice was given by the appellee in this case, and its publication duly proven. In addition, the Ford Lumber & Manufacturing Company, by its president, voluntarily went into the Madison County Court, and presented a written transfer to Richards of the use of its lands on the Clark county side of the river, where the proposed ferry will be established, by which it became the latter's privy. Furthermore, it was formally made a party to the proceedings in the Madison Circuit Court, of which it had notice before the issual of the writ of prohibition.

It is contended by counsel for appellant that if the Clark County Court was in error in holding that its statutory power to grant a ferry license was stayed by the pendency of the previous motion of appellee for a ferry privilege in the Madison County Court at the same point, the only remedy is by appeal; and in support of this contention the decisions of this court in Arnold v. Shields, 5 Dana, 18, 30 Am. Dec., 669, and Sasseen v. Hammond, 18 B. Mon., 673, are relied on. These decisions indicate the caution exercised by the courts in resorting to a remedy which in that developing period of our jurisprudence was so rarely needed; but latterly this court has found that cases sometimes arise where the right of appeal does not afford a plain, speedy, and adequate remedy, hence the aid of the writ of prohibition is more frequently invoked and allowed than was formerly the case. Indeed, this fact seems to have been recognized by the makers of our present Constitution, for section 110 of that instrument confers upon the Court of Appeals the

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power "to issue such writs as may be necessary to give it general control of inferior jurisdictions."

In Hindman v. Toney, 97 Ky., 413, 17 R., 286, 30 S. W., 1006, this court, in construing the provision of the Constitution, *supra*, held that it gave the court plenary power to issue the writ of prohibition in every case when necessary to give it general control of inferior jurisdictions, but said that it would not be exercised when adequate relief could be obtained by appeal.

In Weaver v. Toney, 107 Ky., 419, 21 R., 1157, 54 S. W., 732, 50 L. R. A., 105, it was said: "In view of these cases, it must be recognized as settled law that in proper cases, where the inferior tribunal is proceeding out of its jurisdiction, the power of this court may be invoked to stay the exercise of such jurisdiction; and it would also seem in certain classes of cases that even where the inferior tribunal has jurisdiction, this court may likewise interfere, if the remedy by appeal is not entirely adequate, or if the court, in the exercise of its discretionary power, shall deem it necessary to so interfere."

In McCann v. City of Louisville, 23 R., 558, 63 S. W., 446, the magistrate courts, against which the writs of prohibition issued, undeniably had jurisdiction of the suits which they were forbidden to try. The circuit court, which issued the writs, had first acquired jurisdiction, and if the inferior courts had been allowed to proceed the result would have been tedious litigation, unnecessary costs, and in other respects confusion and conflict, which would have been highly prejudicial to the party in the right, and to the State as well. The parties in the Jefferson Circuit Court were not the same as those in the various actions brought in the courts of Magistrates McCann and Adams, against whom the writs of prohibition were issued, but

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all could have been heard in the circuit court which granted the writs of prohibition; therefore the action of the circuit court in granting the writs of prohibition was sustained by this court, which held that prohibition furnished the only adequate remedy in that case.

The same doctrine has been followed by the courts of last resort in many of the States. Havemeyer v. Sup. Court (Cal.), 25 Pac., 433, 10 L. R. A., 646; State v. Aloe (Mo.), 54 S. W., 494, 47 L. R. A., 399; Bullard v. Thorpe (Vt.), 30 Atl., 36, 25 L. R. A., 606, 44 Am. St. Rep., 867.

By section 479, Civil Code, the writ of prohibition is defined to be "an order of a circuit court to an inferior court of limited jurisdiction prohibiting it from proceeding in a matter out of its jurisdiction." We do not understand from this definition that the writ will lie only in a matter which was never or could not ever have been within the jurisdiction of the court prohibited, but includes also "a matter" which may have been but at the time the writ was issued had passed out of its jurisdiction. For instance, when an appeal has been taken, the jurisdiction once possessed by the lower court has passed from it, and it can be prohibited from considering it further. So when the jurisdiction is concurrent or co-ordinate, and one court acquires it, the matter has passed "out of the jurisdiction" of the other court, which might have entertained it had its powers been first invoked.

In the case at bar the necessity for a ferry at Ford had been established by the judgment of the Madison Circuit Court, and appellee granted the right to operate it, and the case had been continued only for the purpose of determining his right to the landing on the Clark county side of the river, which that court had jurisdiction to determine, even by awarding a writ of *ad quod damnum*, if necessary,

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which judgment, and steps taken and contemplated, were fully known to the Ford Lumber & Manufacturing Company. It is manifest that the urgency of that company in pushing a trial of its application for the same ferry in the Clark County Court was for the purpose of trying to forestall the action of the Madison Circuit Court, thinking that pending the delay in ascertaining whether or not there was a public way to the street in Ford from the ferry on the Clark side, or in condemning one, it could get a judgment in Clark which might be pleaded in the Madison Circuit Court in bar of the proceedings in that court. To allow such a conflict between courts of concurrent jurisdiction would beget confusion and cause delay that might, and doubtless would, result in great injustice to the party in the right and also to the general public.

Being of the opinion that the writ of prohibition will afford appellee the only "plain, speedy, and adequate remedy," and that the facts of this case justified the circuit court in granting it, the judgment is hereby affirmed.

Petition for rehearing by appellants, overruled.

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CASE 87—PROCEEDINGS BY WARRANT IN THE NAME OF THE CITY OF LOUISVILLE, AND IN THE POLICE COURT OF THE CITY OF LOUISVILLE AGAINST HENRY WEHMHOFF, ED. ALVEY, JAMES S. PIRTLE AND CHARLES SMITH, FOR THE VIOLATION OF A CITY ORDINANCE BY OPERATING POOLROOMS.—NOV. 18.

City of Louisville v. Wehmhoff &c.
Same v. Alvey &c.
Same v. Pirtle.
Same v. Smith.

APPEAL FROM JEFFERSON CIRCUIT COURT, CRIMINAL DIVISION.

FROM AN ORDER DISMISSING THE CITY'S APPEAL TO THE CIRCUIT COURT FROM JUDGMENTS SUSTAINING DEMURRERS TO THE WARRANTS, THE CITY APPEALS. REVERSED.

MUNICIPAL CORPORATIONS—ORDINANCES—LOCAL LAWS—COMMON LAW OFFENSES—TITLE EMBRACING SEVERAL SUBJECTS—PROSECUTION IN NAME OF CITY—WARRANTS—SUFFICIENCY—AMENDMENT—APPEAL—GAMING—MUNICIPAL REGULATION—VALIDITY OF ORDINANCES—INTERSTATE COMMERCE—INTERFERENCE—INCONSISTENT CONTENTION.

Held: 1. Where an appeal is dismissed because of a clerical misprision in the style of the cause, and, on being corrected as indicated by the dismissal, an appeal is again taken, the subsequent appeal will not be dismissed, as being the same appeal previously dismissed.

2. Kentucky Statutes, 1899, section 2922, providing that the legality of an ordinance of a city of the first class may be tested by the city by an appeal to the Jefferson circuit court, and then to the Court of Appeals, as other cases in the circuit court are appealed, and referring to Louisville, in Jefferson county—the only city of the first class—is not repugnant to Const., section 59, forbidding local laws regulating the jurisdiction of courts.

3. Const., section 123, providing that all prosecutions shall be in the name and by the authority of the Commonwealth of Kentucky, does not preclude a prosecution in a municipal court, in the name of the city, for the violation of an ordinance, author-

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ized by Kentucky Statutes, 1899, section 2917, providing that all fines realized in such court, whether the prosecution be in the name of the city or the Commonwealth, shall be paid into the city treasury.

4. Under Kentucky Statutes, 1899, sections 2742, 2783, conferring on cities of the first class power to pass such ordinances for municipal purposes as they may deem proper, not in conflict with the Constitutions of the United States and Kentucky, and section 2782, providing that the council shall have power to pass ordinances imposing fines not exceeding $100 for any designated misdemeanor provided for by the general laws of the Commonwealth, but, where the general statutes impose a fine not exceeding $100, such fine may be imposed by ordinance, the council may by ordinance punish acts which are offenses at common law, as section 2782 was not intended to restrict the council's powers in defining what should be offenses within the city, but defined its authority in prescribing the limits of punishment.

5. Louisville City Ordinance, entitled "An ordinance to prevent the operation of poolrooms in the city of Louisville," and providing for the punishment of the operator of the poolroom, his servants or employes engaged in operating it, the owner or controlling agent of the building, who knowingly lets it for the purpose, the telegraph, telephone, or messenger company knowingly transmitting messages to enable the selling of pools, and the person who buys or has possession of the tickets, is not repugnant to Kentucky Statute, 1899, section 2777, providing that no ordinance shall embrace more than one subject, and that shall be expressed in its title.

6. Louisville City Ordinance, section 4, making it unlawful for any telegraph company to furnish to any owner, agent, or employe of any poolroom maintained in the city any communication concerning any horse races in or out of the city is not invalid as an unauthorized interference with the legitimate business of a common carrier to contract to deliver messages.

7. A warrant charging a violation of an ordinance to prevent the operation of poolrooms should not be dismissed because the ordinance specifies several offenses, as it may be amended so as to apprise the accused of the provision he is charged with violating.

ON PETITION FOR REHEARING.

8. A contention on the hearing of an appeal that the offense created by a certain ordinance was not an offense at all did not estop the one making it from arguing on the rehearing that

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the ordinance was void because violative of Const., section 168, forbidding the passage of ordinances fixing less penalties than those fixed by the statute for the same offense.

9. Conceding that an ordinance prohibiting and punishing the operation of poolrooms was broad enough to include French pools, which has been construed as a contrivance used in betting, within Kentucky Statutes, 1903, sections 1960-1961, which fix a greater penalty than that fixed by the ordinance for setting up and operating such contrivances, and hence is, as to French pools, void, because violative of Const., section 168, forbidding the enactment of ordinances prescribing less penalties than fixed by statute for the same offense, yet it is void only as to that class of pool selling, and is valid in other particulars prescribed therein, such as the penalties affixed to the acts of having pool tickets in possession, and furnishing telegraphic messages to operators, knowing that they are to be used to further the business of pool selling, which are not within the statutory prohibition.

10. The act of pool selling or betting by buyers on pools is not a game, within Kentucky Statutes, 1903, section 1978, prescribing a penalty for those suffering any game in which any property or money is bet, won, or lost in any house or in premises in their occupation.

11. A city ordinance forbidding the transmission to a poolroom operator of messages intended to be used in business of pool selling in the city is a valid exercise of the police power of the State.

12. An ordinance forbidding transmission of telegraphic messages to poolrooms is not an unconstitutional regulation of interstate commerce, though the telegrams come from another State.

HENRY L. STONE, CITY ATTORNEY, FOR APPELLANT.

AUTHORITIES CITED.

Statement. 1. Sec. 2782, Kentucky Statutes; sec. 2922, Kentucky Statutes; City of Louisville v. Wehmhoff, &c., 24 R., 438-443, 68 S. W., 650-653.

2. These prosecutions are properly conducted in the name of the city of Louisville. Secs. 2917, 2922, 2936, 2939, Kentucky Statutes; Williamson v. Commonwealth, 4 B. Mon., 446; Dillon on Municipal Corporations, vol. 1, sec. 433, p. 502; secs. 11, 10, Criminal Code.

3. The offense against the appellees is sufficiently stated in the ordinance warrants. Secs. 10, 27, Criminal Code; Fourth Compilation of the Ordinances of the City of Louisville, pp. 309-312; *Ex parte* Lacy (Va.), 31 L. R. A., 822; 3 Rob. Pr.,

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old ed., p. 10; Bishop, Crim. Proc., sec. 714; secs. 2795, 2751, 2761, 2775, 2922, Kentucky Statutes; Barret v. Godshaw, 12 Bush, 592; Woolley v. City of Louisville, 24 R., 1362.

4. The ordinance in controversy does not violate the act for the government of cities of the first class in regard to the title and the subject matter thereof. *Ex parte* Lacy (Va.), 31 L. R. A., 822; Ingles v. Straus, 91 Va., 209; Commonwealth v. Brown, 91 Va., 762.

5. The statutory right of the appellant, city of Louisville, to appeal from judgment of the police court to the circuit court, and thence to the court of appeals. Secs. 2922, 3063, 3367, 3519, 2912, 2993, Kentucky Statutes, sec. 59 of the Constitution; Burnett's City Code (1884), sec. 27, p. 189; City of Louisville v. Kuntz, 20 R., 805; Shoemaker v. Hodge, judge, 23 R., 736; 63 S. W., 979; Winston, commissioner, v. Stone, auditor, 102 Ky., 423; Stone, auditor, v. Wilson, 19 R., 126; Commonwealth v. E. H. Taylor, Jr., Co., 101 Ky., 325; City of Lexington v. Home Construction Company, 23 R., 1387; secs. 362, 363, Criminal Code.

6. The city of Louisville, under sections 2782 and 2783, Kentucky Statutes, is authorized to legislate against offenses at common law. Secs. 2782, 2783, 2913, Kentucky Statutes; Burnett's City Code, sec. 20, p. 361; Respass v. Commonwealth, 21 R., 789; Simms v. Owensboro, 99 Ky., 49; Cons. Debates, vol. 2, pp. 2992-3; Kemper v. Commonwealth, 85 Ky., 219; Kyle v. Malin, 8 Indiana, 34; City of Crawfordsville v. Braden, 130 Ind., 214; Leesburg v. Putnam, 103 Ga., 110; Jacksonville, Electric Co. v. Jacksonville, 30 L. R. A., 340; Cooley on Constitutional Limitations, 231; 1 Dillon on Municipal Corp., secs. 173, 508.

7. The offenses defined by the ordinance to prevent the operation of pool rooms in the city of Louisville are not offenses punishable at common law. Commonwealth v. Respass, 21 Ky. Law Rep., 140, Ib., 789; Kneffler v. Commonwealth, 94 Ky., 359; Bollinger v. Commonwealth, Sharp v. Same, 98 Ky., 574; Commonwealth v. Enright, Ib., 635; Cheek v. Commonwealth, 100 Ky., 1, 79 Ky., 359; Harlow v. Commonwealth, 11 Bush, 610; Russell on Crimes, title "Nuisances," vol. 1, p. 745; Clark on Criminal Law, vol. 2, p. 1126; Bishop on Criminal Procedure, vol. 2, secs. 117 and 278; Burton v. State, 16 Texas Court of Appeals, 156; King v. State, 17 Fla., 191; State v. Bell, 5 Porter, Ala., 375; Commonwealth v. Churchill, 136 Mass., 150; Commonwealth v. Bessler, 97 Ky., 498; Cawein v. Commonwealth, 22 R., 1734; 61 S. W., 275; Sec. 1977, Kentucky Statutes.

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8. Telegraph companies, their managers, agents, and employes may be punished for their unlawful acts as defined in the ordinance to prevent the operation of pool rooms in the city of Louisville. Smith v. Western Union Telegraph Company, 84 Ky., 664; Commonwealth v. Western Union Telegraph Co., 23 R., 1633, 57 L. R. A., 614, 67 S. W., 59; Kneffler v. Commonwealth, 94 Ky., 359; Sec. 1346, Kentucky Statutes; Watson v. Fletcher, 7 Gratt, 1; Gray on Communication by Telegraph, sec. 15; Bryant v. Western Union Telegraph Co., 17 Fed., 825; Cothran v. Same, 83 Ga., 25; Gray v. Same, 87 Ga., 350; Melchert v. American Union Tel. Co., 11 Fed. Rep., 194; *Ex parte* Lacy, 31 L. R. A., 822; State of Alabama v. Stripling, 36 L. R. A., 81; C. & O. Ry. Co. v. City of Maysville, 24 R., part 1, p. 617.

KOHN, BAIRD & SPINDLE, FRED FORCHT AND RICHARDS & RONALD, FOR APPELLEES.

GEO. H. FEARONS, OF COUNSEL.

1. Penal actions are regulated by the Civil Code, but "prosecutions shall be carried on in the name and by the authority of the Commonwealth."

2. A warrant must state the offense. It is not sufficient to refer alone to the title of the act or ordinance creating the offense.

3. A statute conferring special jurisdiction on the "Jefferson circuit court" is local legislation within the inhibition of section 59 of the present Constitution.

4. A city council can not enact an ordinance creating offenses without special legislative authority.

5. An ordinance which makes it criminal for the agent of a telegraph company to deliver a message "concerning any horse race" to "any owner, proprietor, agent or employe of any pool-room" is an attempted exercise of "arbitrary power," and void.

AUTHORITIES CITED.

Secs 59, 123, 233, 168, Kentucky Constitution; Secs., 10, 11, 311, Criminal Code of Ky.; Secs. 29922, 2777, 2742,2782, 2783, Kentucky Statutes; Commonwealth v. L. & N. R. R. Co., 80 Ky., 292; Williamson v. Commonwealth, 4 B. Mon., 146; Wallenweber v. Commonwealth, 3 Bush, 69; McGowan v. Commonwealth, 2 Metcalfe, 4; Wade v. Commonwealth, 3 Ky. Law Rep., 443; Horr & Bemis on Municipal Ordinances, sec. 173; Hunting-

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ton v. Peas, 56 Ind., 305; Hughes' Crim. Law & Procedure (Ed., 1901), sec. 2779; Piper v. Gunther, 95 Ky., 119; City of Louisville v. Kuntz, 20 Ky. Law Rep., 805; 132 Pa. State, 275; Gorley v. City, 20 Ky. Law Rep., 602; Shumaker v. Hodge, 23 Ky. Law Rep., 736; Winston v. Stone, Auditor, 102 Ky., 423; Kneiffer v. City of Louisville, 7 Bush, 599; Endlich on Stat., secs. 330, 350, 216, 223, 399; Curtis v. Commonwealth, 23 Ky. Law Rep., 267; Dillon on Municipal Corporations, secs. 315, 316; Ray v. Sweeney, 14 Bush, 11; Commonwealth v. Duff, 87 Ky., 586; Bollinger v. Commonwealth, 98 Ky., 574; Commonwealth v. Enright, 98 Ky., 535; Cheek v. Commonwealth, 79 Ky., 359; Cheek v. Commonwealth, 100 Ky., 2; Commonwealth v. Respass, 21 Ky. Law Rep., 140; Respass v. Commonwealth, 21 Ky. Law Rep., 789; Cawein v. Commonwealth, 22 Ky. Law Rep., 1734; Harp v. Commonwealth, 22 Ky. Law Rep., 1792; City of Owensboro v. Sparks, 99 Ky., 356.

RICHARDS & RONALD, ATTORNEYS FOR APPELLEE, THE WESTERN UNION TELEGRAPH COMPANY.

GEO. H. FEARONS, OF COUNSEL.

1. The Western Union is a common carrier and "occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods." Its "business is commerce itself." 105 U. S., 464.

2. The Federal Constitution vests in Congress alone the power to regulate this interstate commerce, and a city council can not enforce an ordinance prohibiting the delivery of such messages.

AUTHORITIES CITED.

Kentucky Statutes, sec. 1346; City of Campbellsville v. Odewalt, 24 Ky. Law Rep., 1717 and 1739; Commonwealth v. W. U., 23 Ky. Law Rep., 1633; Gray on Communication by Telegraph, sec 15; Joyce on Electricity, sec. 862; Western Union v. Ferguson, 57 Ind., 495; Telegraph Co. v. Texas, 105 U. S., 464; Commonwealth v. Smith, 92 Ky., 44; Western Union v. Pendleton, 122 U. S., 356; Joyce on Electricity, sec. 215; The Lottery Cases, 188 U. S., 321 (see pp. 252-3); Kentucky Statutes, sec. 1328; Wabash, &c. v. Illinois, 118 U. S., 557; Leisy v. Hardin, 135 U. S., 100; Bowman v. Chicago Ry. Co., 125 U. S., 465; Constitution of Kentucky, sec. 199; Rhodes v. Iowa, 170 U. S., 412; Vance v. Vandercook, 170 U. S., 444.

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REPLY OF HENRY L. STONE, CITY ATTORNEY, FOR APPELLANT, TO APPELLEE'S PETITIONS FOR REHEARING.

AUTHORITIES CITED.

Statement. City of Louisville v. Wehmhoff, *et al.*, 25 R., 995, 76 S. W., 876.

1. The poolroom ordinance is a valid exercise of the police power of the State through the city of Louisville, one of its municipalities. City of Campbellsville v. Odewalt, 24 R., 1739; Western Union Telegraph Co. v. Texas, 105 U. S., 464; Western Union Telegraph Co. v. Pendleton, 122 U. S., 356; Wabash, St. Louis & Pacific R. R. Co. v. Illinois, 118 U. S., 557-596; Bowman v. Chicago & Northwestern Railway Co., 125 U. S., 465-524; Leisy v. Hardin, 135 U. S., 100-160; Vance v. Vandercook, 170 U. S., 444; Rhodes v. Iowa, 170 U. S., 412; Champion v. Ames, 188 U. S., 321 375; Douglas v. Kentucky, 168 U. S., 488; Phalen v. Virginia, 8 How., 163-168; Stone v. Mississippi, 101 U. S., 814-821;; Beer Co. v. Massachusetts, 97 U. S., 25; Patterson v. Kentucky, 97 U. S., 501; Western Union Telegraph Co. v. James, 162 U. S., 650-663; Covington & C. Bridge Co. v. Kentucky, 154 U. S., 204; Secs. 5266 and 5269, U. S. Compiled Statutes, 1901, vol. 3, pp. 3580-3582; Austin v. Tennessee, 179 U. S., 343-349; State v. Bixman, 102 Mo., 1, 62 S. W., 828; State v. Stripling, 113 Ala., 120; Lacy v. Palmer, 93 Va., 159; State v. Harbourne, 70 Conn., 484; 40 L. R. A., 607; Fortenbury v. State, 47 Ark., 188; Alexander v. State, 86 Ga., 246, 10 L. R. A., 859; Irwin v. Williar, 110 U. S., 499; Embry v. Jemison, 131 U. S., 136; 8 Am. & Eng. Ency. of Law, p. 1005.

2. The grounds urged in the petition for rehearing in behalf of the other appellees are also unavailing. Sec. 2782, Kentucky Statutes; Commonwealth v. Simonds, 79 Ky., 618; Cheek v. Commonwealth, 79 Ky., 359; Secs. 1955-1980, Kentucky Statutes; Cheek v. Commonwealth, 100 Ky., 1; Neumeyer, Auditor, v. Krakel, 23 R., 190, 62 S. W., 518.

OPINON OF THE COURT BY JUDGE O'REAR—REVERSING.

These actions originated in the police court of Louisville on four summonses or warrants taken out in the name of the appellant, city of Louisville, against the appellees, respectively, for the violation of an ordinance entitled "An ordinance to prevent the operation of poolrooms in the

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city of Louisville." The appellees in that court demurred to the warrants against them, respectively. The demurrers being each sustained, the city prosecuted an appeal to the Jefferson Circuit Court, Criminal Division. That court, on motion of the appellees, dismissed the appeals on the ground that the statute attempting to confer jurisdiction on it was unconstitutional. From the judgments of dismissal, appeals were prosecuted to this court. Here the appeals were dismissed because it appeared that the cases in which the judgments appealed from had been rendered were styled in the circuit court, "Commonwealth of Kentucky, Appellant, v. Henry Wehmhoff, &c., Appellees." It was said that, for aught the record showed, the prosecutions begun in the police court, styled, "City of Louisville, Plaintiff," were yet pending on the appeals in the circuit court. See City of Louisville v. Wehmhoff, &c., 24 R., 438, 68 S. W., 650. In the course of the majority opinion on that appeal, it was said: "If a clerical misprision in regard to the prosecutions of the appellant against appellees has occurred in the city court, the appellant has a right to have such misprisions corrected, upon proper proceedings, and the dismissal of this appeal in no wise affects that right. There is nothing in this judgment or the record, as now before us for consideration, which would preclude the appellant from obtaining a trial of the appeals which it took from the police court to the circuit court; and we expressly hold that this judgment of dismissal is no bar to the right of appellant to have a trial of the appeals prosecuted by it as aforesaid, or from obtaining a correction of the records of the Jefferson circuit court, if it is otherwise entitled to such correction." Upon the filing of the mandate in the circuit court, appellant city took appropriate steps to correct the clerical misprision indicated, and it was corrected

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by a judgment of that court as follows (after reciting the fact of the misprision and its nature): "It is now further adjudged by the court that said errors and misprisions of the clerk be, and the same are hereby, corrected by the entry of the foregoing orders and judgments in the above-styled appeals in the name of the city of Louisville as appellant, instead of the Commonwealth as appellant, as of the dates aforesaid, including the final judgment therein on November 25, 1901, *nunc pro tunc*." Among the orders referred to in the foregoing quotation was this one (correctly styled): "This day the court, being advised, sustained the motion to dismiss the four above-styled appeals. Therefore ordered by the court that the four above-styled appeals be, and the same are, dismissed, to which the plaintiff objects and excepts, and prays an appeal to the Court of Appeals of Kentucky, which is granted." Thereupon this appeal was perfected by filing in the clerk's office of this court the transcript of the record.

The first question made by appellees is that there is no appeal pending, because they say that the appeal being prosecuted is the one heretofore actually dismissed, and that none other has ever been granted either by the clerk of this court, or by the trial court. We regard the judgment as entered in October, 1902, on the return of this case from this court, as the only judgment in this case in that court. Until it was entered as corrected, there could be no appeal from it by the appellant, city of Louisville. That is the precise point decided on the former appeal. The appeal therein granted could not be exhausted till it was taken, or until it was barred by limitation. It could not be legally prosecuted before a final judgment was rendered in the proceedings. Such judgment, under the rulings of the former opinion, was not entered in the old record, and

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hence was not entered till the correction of the clerk's misprision. The motion to dismiss the appeals must be overruled.

The very careful preparation of the case presents a number of other questions, the importance of which is earnestly pressed in the argument. We have given them all close consideration, and will dispose of them in their proper order.

2. It is claimed by appellees that the Jefferson Circuit Court had not the jurisdiction of the appeals from the police court. If this be so, the decision of that question terminates our authority to pass upon the merits, and other questions in these cases. The city of Louisville, in Jefferson county, is a city of the first class, and the only city of that class, or that has ever been in that class, in this State, under the classification required by the present Constitution. In the act providing for the organization and government of cities of the first class, among its other governmental agencies, it was provided with a police court and a general council. The power of the council to pass ordinances, and the jurisdiction of the courts to construe and enforce them, were necessarily provided for. In allowing appeals from the judgments of the police court of cities of the first class, as well as in providing a method for testing the validity of the ordinances passed by the general council, it was enacted (section 2922, Ky. St., 1899): "Appeals shall be from the decisions of said court to the circuit court in all cases where the amount of the fine imposed is as much as twenty dollars. In cases where a fine of twenty dollars or less is imposed under an ordinance, the legality of said ordinance may be tested by the city by an appeal to the Jefferson Circuit Court or by the defendant by a writ of prohibition to the Jefferson Circuit Court, and after a

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decision has been rendered in the circuit court, as provided for in this section, either the city or the accused may appeal to the court of appeals as other cases in the circuit court are appealed." Appellees' contention is that this section of the statutes violates section 59 of the Constitution, which limits the power of the Legislature in passing local acts, and forbids those regulating the jurisdiction of courts. The importance of this question is emphasized when it is reflected that there is no other provision of law than section 2922 for the city's prosecuting appeals from the judgments of the police court of Louisville, or for testing the validity of the ordinances of that city, as well as that almost the same provision alone is made for appeals and testing the validity of the ordinances of the cities of the fourth class. Section 3519, Ky. St., 1899. The appellate jurisdiction of the circuit courts of this Commonwealth, as fixed by section 978, Ky. St., 1899, is made to include certain named appeals, "and in all other cases allowed by law." Prior to the passage of the act governing cities of the first class, the city of Louisville was governed under a charter granted by the Legislature before the present Constitution. In that charter there was substantially the same provision for appeals from the police court, and especially for testing the validity of ordinances passed by the general council, as is contained in section 2922. It is found in Burnett's City Code, 1884, sec. 27, p. 189. Although the Constitution does not require the jurisdiction of the circuit courts to be uniform throughout the Commonwealth (section 126), and although by statute they are not, as, for example, the Franklin circuit court is made the fiscal court of the Commonwealth, with jurisdiction concurrent or exclusive in such matters, as well as in certain other penal matters, we are of opinion that this statute does not

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affect that question. The jurisdiction of the circuit courts is already (section 978, Ky. St., 1899) made to include "all cases allowed by law," and, by general laws applicable to all the cities of a particular class, provision is made for testing the validity of ordinances, and for appeals from the police courts. The statutes affecting the jurisdiction of the circuit court need not all be embraced by one act. The thing required is that they shall be general laws only. It would hardly be claimed that an act creating an offense, fixing a penalty, and naming the court which should have jurisdiction of the prosecution, is violative of section 59 of the Constitution, as being a local act regulating the jurisdiction of the courts. The Constitution allows the establishment of police courts in the cities and towns of this Commonwealth (section 143), with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the town, and criminal jurisdiction within the limits of the town as justices of the peace have. In providing these courts, it is competent for the Legislature to provide for appeals from their judgments, and to provide in what instances and to what courts the appeals will lie. It must be manifest that the final jurisdictions of these minor courts might well be differentiated for the same reasons that the cities are classified differently, so that, in providing a government for a city of any class, it is competent to provide for it a police court from whose judgments appeals in given instances will lie to the circuit court of the county. Nor is it at all necessary that all police courts in the State should have the same regulation in this respect. This section allowing appeals or prohibition to test the validity of municipal ordinances is really more of an incident in providing a city government, although it incidentally affects the jurisdiction of the courts

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in the counties where such cities may be located. We regard the use of the words "Jefferson Circuit Court," in the section, as an inadvertence, growing out of drafting the bill from the old city charter. The same immaterial lapse is noticed in other places in the act. It should be ignored, as surplusage, rather than be suffered to defeat the clear purpose of the Legislature, as well as to invalidate an important right of the city and of its inhabitants. We construe this section to mean that either party—the city or the defendant—may prosecute an appeal to the circuit court of the county, where the penalty fixed by the ordinance is as much as $20. Upon such an appeal the case would be tried upon its merits *de novo*. But if the penalty be less than $20, either party, for the purpose of testing the validity of the ordinance, may go to the circuit court of the county—the defendant by prohibition, and the city by appeal. If, in a reclassification of the cities of the Commonwealth, another or others are added to the first class, this section would apply to them; the words "Jefferson Circuit Court" being read "circuit court of the county." We are of the opinion that the Jefferson Circuit Court, Criminal Division, had jurisdiction of these appeals.

3. The next proposition is: It is argued that the prosecution was improperly in the name of the city of Louisville. Appellees contend that, under the Constitution, the prosecutions must have been in the name of the Commonwealth of Kentucky. Section 123 of the Constitution is, in part: ". . . All prosecutions shall be carried on in the name and by the authority of the 'Commonwealth of Kentucky,' and conclude against the peace and dignity of the same." This identical language was used in all the previous Constitutions of this State. The word "prosecutions," as used in this section and in other sections, has been construed to

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embrace only such transgressions as were at common law indictable offenses, or were punishable by imprisonment or other infamous mode. In Commonwealth v. Avery, 14 Bush, 625, 29 Am. Rep., 429, it was held that a statute imposing a fine for betting on an election was neither an indictable offense at the common law, nor was it visited with any infamous punishment by statute. It was then held that a penal action would lie to recover the fine, without an indictment having been found, and that it was not a "criminal prosecution," as contemplated by the use of the term in the Constitution. In Lowry v. Commonwealth (18 R., 481), 36 S. W., 1117, the appellant was arrested on a warrant, without indictment, and tried before a minor judicial officer, and convicted of a violation of the local option law. Answering his objection that he was being deprived of a constitutional right, in that he was being tried for an indictable offense upon information merely, the court said: "Misdemeanors created by statute, for which no infamous punishment is provided, may be tried in such manner as the Legislature shall provide." The Legislature, in granting the charter of the City of Lexington in 1842, authorized it to prosecute and recover in the name of the city, for all infractions of its ordinances. The city council passed an ordinance providing a punishment for breaches of the peace. In Williamson v. Commonwealth, 4 B. Mon., 146, the appellant had been convicted under the ordinance in a proceeding upon a warrant issued in the name of the city of Lexington. He contended that the act of the Legislature in attempting to confer authority upon the city to prosecute for offenses in the name of the city, as well as allowing the proceeding upon information without indictment, was violative of the Constitution. This court held that proceedings for offenses punishable by fine only are of

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a quasi civil nature, and did not violate either of the provisions of the Constitution. This case has since been approved, and its doctrines applied, in allowing penal actions, without indictment, to recover for offenses where the only penalty was a fine. Commonwealth v. L. & N. R. Co. (18 R., 610), 37 S. W., 589; Harp v. Commonwealth (22 R., 1792), 61 S. W., 467; Commonwealth v. L. & N. R. Co., 80 Ky., 291, 3 R., 788, 44 Am. Rep., 475; Commonwealth v. Sherman, 85 Ky., 686, 9 R., 218, 4 S. W., 790; L. & N. R. Co. v. Commonwealth (23 R., 1900), 66 S. W., 505. These and similar constitutional guaranties of the citizen, like that of trial by jury, have been variously and frequently considered by the courts of last resort of many of the States. The weight of authority seems to be that such summary proceedings by municipal courts for the violations of municipal by-laws are not repugnant to these constitutional provisions. Dillon on Munic. Corp., secs. 433, 368; Smith, Modern Law of Munic. Corp., sec. 1353 *et seq.*, and cases there collected. The only question left under this head is, has the Legislature authorized the proceeding to be in the name of the city? Section 2917, Kentucky Statutes, 1899, being a part of the law governing cities of the first class, reads: "All fines and recoveries realized in said court, whether the prosecution be in the name of the city or commonwealth, shall be paid to the city treasurer as a contribution toward the expenses of said court." By section 2922, already quoted, appeals are allowed to either the city or the accused; clearly indicating that the city was to be one of the parties to the proceeding. Strictly, violations of municipal ordinances are not violations of laws of the Commonwealth. The municipality alone is concerned, and it properly ought to be, and has always been regarded in this State, by universal practice, so far as our attention has

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been directed, as being the prosecutor. We conclude, therefore, that the correct practice is to style the prosecutions in the name of the city.

4. Probably the most important question is as to the power of the general council to pass ordinances to punish those acts which are offenses at the common law. Of course, the municipality has only such power in this respect as has been granted to it by the Legislature. The only grant to cities of the first class to pass such ordinances is contained in the following sections of the Kentucky Statutes of 1899:

"Sec. 2742. That the inhabitants of cities of the first class are hereby continued corporate by the name and style which they now bear, with power to govern themselves by such ordinances and resolutions for municipal purposes as they may deem proper, not to conflict with this act, nor the Constitution and laws of this State, nor of the United States."

"Sec. 2782. Ordinance Imposing Fine for Misdemeanor. The general council shall have power to pass ordinances imposing fines, not exceeding one hundred dollars, for any designated misdemeanor not provided for by the general laws of the Commonwealth; but in case where the General Statutes of the Commonwealth impose a fine not exceeding one hundred dollars such fine may be increased by ordinance.

"Sec. 2783. Power to Pass Ordinances not in Conflict with the Constitution and Statutes. The general council shall have power to pass, for the government of the city, any ordinance not in conflict with the Constitution of the United States, the Constitution of Kentucky, and the statutes thereof."

Appellee insists that the proper construction of these sections is that the general council is restricted by the par-

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ticular language of section 2782 to passing ordinances making unlawful within the city only those things which at common law were not offenses, or which have been made such by statute; that the operation of a poolroom (that is, a place where betting on horse races was habitually indulged) was at common law a nuisance, and, being unprovided for by any statute of this State, it was beyond the power of the general council to legislate with reference thereto. We think there has been a total misconception of the purpose and scope of this section of the statute. In the first place, the cardinal test must be the legislative intention in enacting the sections. We must presume that that body intended to vest in the local legislative board of the largest city in the State at least as much power with respect to passing by-laws for the police regulation of its inhabitants, and for the conservation of the morals and welfare of that population, as was given to the lesser towns and cities. In all the others, specific authority is granted to them to pass by-laws to suppress and punish nuisances. In defining the powers of the legislative bodies of all the other municipalities, they are minutely given, with reference to enumerated specific subjects. In the grant to cities of the first class there is an entire absence of such careful restriction. This alone, in view of the ample general terms employed, would seem to indicate that the powers granted the first-class cities over such subjects were broader and more comprehensive than those granted the others. But however that may be, we think that section 2782 was not enacted to restrict the general council's powers in defining what should be offenses within the city, but was intended solely to define its authority in prescribing the limits of punishment for such matters as were made offenses by ordinance. Section 168 of the recent Constitution had for the first time

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in this State placed a constitutional restriction upon the power of all municipalities as to the extent of punishment to be inflicted by the city where the same act was an offense against the Commonwealth, punishment for which was fixed by statute. That section is as follows: "No municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense. A conviction or acquittal under either shall constitute a bar to another prosecution for the same offense." The purpose of this statute (section 2782) was to apply section 168 of the Constitution. It allowed the city to punish the same act that was by statute a misdemeanor by the penal laws of the State. But it required the council to fix the same penalty as the statute did, where the penalty was $100 fine. Where the statutory penalty was less than $100 fine, the municipality might impose a higher penalty up to $100, for an infraction of its ordinance. Where no penalty was fixed by statute, the municipality was at liberty to fix such penalty as it deemed proper, not exceeding $100. The only other limitation on this power was that found in the succeeding section (Ky. St., 1899, sec. 2783), which was that the ordinance should not be in conflict with the Constitution or statutes of the United States or of this State. That such is the correct meaning of these sections, we think, is made plain by opinions of this court in City of Owensboro v. Simms, 99 Ky., 49, 17 R., 1393, 34 S. W., 1085, and Respass v. Commonwealth, 107 Ky., 139, 21 R., 789, 53 S. W., 24. In the Respass case the city of Covington had by ordinance fixed a penalty for operating poolrooms within the city. A conviction in the police court was interposed as a bar to an indictment for the same offense in the circuit court. It was denied. This court held that section 168 of the Constitution limited the power of the municipalities as to fixing penalties to those

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cases only where a penalty for the same act was fixed by statute, and that as operating poolrooms was not a statutory offense in this State, but one punishable at common law only, the section of the Constitution did not apply, and the punishment by the ordinance was held not to be a bar to a prosecution for the same offense by the State. The exercise of police power by the State, or as delegated by it to its municipalities, is an essential and inalienable attribute of sovereignty and government. It is at the very bottom of all social government, and, while jealously scrutinized in its application, lest the rights of the citizen be arbitrarily encroached upon under its guise, yet its existence never has been and never can be denied. The rights of persons in conducting their business or using their property are subordinate to this power. The regulation of commerce between the States by the Federal government likewise yields to its legitimate application. Cooley, Const. Law, 709; Patterson v. Commonwealth, 11 Bush, 312, 21 Am. Rep., 220, affirmed on appeal to the Supreme Court, 97 U. S., 501, 24 L. Ed., 1115; Moore v. Illinois, 14 How., 13, 14 L. Ed., 306; Chicago, &c., R. Co. v. Fuller, 17 Wall., 560, 21 L. Ed., 710; Passenger Cases, 7 How., 283, 12 L. Ed., 702; Morgan Steamship Co. v. Louisiana Board of Health, 118 U. S., 455, 6 Sup. Ct., 1114, 30 L. Ed., 237. Of its general nature, a comprehensive definition is given by Jeremy Bentham, in his General View of Public Offenses (Edinborough Ed. of Works), pt. 9, p. 157, in part, thus: "Police is in general a system of precaution, either for the prevention of crimes or of calamities." "Laws and regulations necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police powers." Smith, Munic. Corp., 1319. "Municipal corporations have exercised the police power *eo nomine* for

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time out of mind, by making regulations to preserve order, etc., . . . and this power of local legislation may be conferred upon the smallest village that the Legislature sees fit to incorporate, as well as upon the largest city in the State." Id., 1320, 1321. The strife generally is over the question whether the particular business or use of property prohibited by the act or ordinance is within the proper exercise of that power. We will not go further into the subject than its application to the particular matter embraced by the ordinance under examination. Tiedman on Limitations of Police Power (a very conservative treatise upon the subject) declares that (sections 99-102) when parties "pursue gambling as a business, and set up a gambling house, like all others who make a trade of vice, they may be prohibited and subjected to severe penalties." In California, under the police power delegated generally by the Constitution to the cities and counties, it was held in *Ex parte* Tuttle, 91 Cal., 589, 27 Pac., 933, that the municipality of San Francisco could lawfully provide a penalty against pool-selling on horse races committed within the city, although there was no statute of the State on the subject. The same was held in Georgia in Odell v. City of Atlanta, 97 Ga., 670, 25 S. E., 173. In that case it was said: "We are not aware of any statute of this State which makes the carrying on of this so-called business penal, and it is therefore strictly within the purview of municipal legislation. Under the general welfare clause of the charter of the city of Atlanta, the mayor and council had authority to pass the ordinance of which the plaintiff in error complains. That ordinance forbade, under a penalty, the keeping or maintenance of any office or place of business in the city in which any persons were allowed to bet on horse races or any other kind of races, whether run within the city or outside of its limits.

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We think it was perfectly lawful and proper both to adopt and enforce an ordinance of this kind." Indeed, it would seem that citation of authority that the State or a municipality may lawfully prohibit gambling as a proper exercise of police power, is unnecessary in this day and time.

5. This brings us to the consideration of appellees' next contention, which is, does the title of the ordinance sufficiently indicate the subjects treated therein, and does the ordinance embrace more than one subject? Section 2777, Kentucky Statutes, 1899, on this subject, reads: "No ordinance shall embrace more than one subject, and that shall be expressed in its title."

The ordinance in question is as follows:

"An Ordinance to Prevent the Operation of Poolrooms in the City of Louisville.

"Be it ordained by the general council of the City of Louisville:

"Section 1. That it shall be unlawful for any person, firm or corporation to establish, set up, maintain, keep or operate, or conduct in the city of Louisville a poolroom, or what is commonly called 'poolroom,' wherein or whereat any money or other thing of value shall be or can be bet, won, or lost on the result of any horse race or races, run or to be run in or our of the city of Louisville, or wherein or whereat any money or other thing of value shall be received or paid for any ticket, lot, pool, or chance on the result of any such horse race or races run or to be run in or out of the city of Louisville; and any person, firm, or corporation that shall violate any provision of this section shall, on conviction, be fined one hundred dollars for each offense; and each day such poolroom is thus maintained, kept, operated, or conducted shall constitute a separate offense.

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"Sec. 2. That it shall be unlawful for any person to aid, abet, or assist any other person or corporation, or to act as the agent or employe of any other person or corporation in establishing, setting up, maintaining, keeping, operating, or conducting any such poolroom as is defined in section 1 of this ordinance; and any person who shall violate any provision of this section shall, on conviction, be fined in any sum not less than twenty-five nor more than one hundred dollars for each offense; and each day any person shall thus aid, abet, or assist in maintaining, keeping, operating, or conducting such a poolroom, or shall act as agent or employe of any person or corporation in maintaining, keeping, operating, or conducting such a poolroom, shall constitute a separate offense.

"Sec. 3. That it shall be unlawful for any person, firm, or corporation, either as owner or agent, to let, lease, or rent to any other person, firm, or corporation any room, house, or building to be used or occupied as a poolroom, or for any of the purposes defined in section 1 of this ordinance; or as owner or agent, to permit any room, house, or building to be so used or occupied, after receiving notice thereof; and any person, firm, or corporation that shall violate any provision of this section shall, on conviction, be fined in any sum not less than fifty dollars nor more than one hundred dollars for each offense, and each day such room, house, or building shall be so used or occupied shall constitute a separate offense.

"Sec. 4. That it shall be unlawful for any telegraph, telephone, or messenger company, or any officer, agent, messenger, or employe thereof, to furnish, deliver, or communicate to any owner, proprietor, agent, or employe of any poolroom maintained, kept, operated, or conducted in the

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city of Louisville for any of the purposes defined in section 1 of this ordinance, any message, communication, or information, to be used at such a poolroom as is defined in section 1 of this ordinance, concerning any horse race or races in or out of the city of Louisville; and any company, person, firm, or corporation that shall violate any provision of this section shall, on conviction, be fined in any sum not less than twenty-five dollars nor more than one hundred dollars for each offense, and each message or communication so furnished, or delivered, or communicated, shall constitute a separate offense.

"Sec. 5. That it shall be unlawful for any person to buy or to have in his possession any ticket, lot, pool, or chance in or of any such poolroom as is defined in section 1 of this ordinance, on any horse race or races ran or to be run in or out of the city of Louisville; and any person who shall violate any provision of this section shall, on conviction, be fined in any sum not less than five dollars nor more than fifty dollars for each offense.

"Sec. 6. That it shall be the duty of the board of public safety, and each member of said board, to suppress all such poolrooms as are defined in section 1 of this ordinance, and by and through the police force to faithfully execute all the provisions of this ordinance; and it shall be the duty of the chief of police and each member of the police force of the city of Louisville to detect and arrest all violators of any provision of this ordinance, and any wilful failure or refusal to do so by any officer, patrolman, or detective on the police force shall subject him to a fine of not less than fifty dollars nor more than one hundred dollars for each offense, and on conviction for such offense in the police court of the city of Louisville, it shall be the duty of said board, after notice to and trial of such convicted member of the

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police department, to dismiss him from further service therein, and to not thereafter appoint him to any position in said department, or place him on the pay rolls thereof.

"Sec. 7. That any member of the board of public safety who shall wilfully fail or refuse to execute any provisions of this ordinance, or to join with any other member of said board in executing the same, or who shall wilfully fail or refuse to dismiss or to join with any other member of said board in dismissing from further service in the police department any member thereof who shall have been convicted in the police court of the city of Louisville of violating any provision of this ordinance, or any member of said board who shall appoint or join any other member of said board in appointing any such convicted member of the police department to any position therein, or who shall place, or join with any other member of said board in placing, any such convicted member of the police department on the pay rolls thereof, shall, on conviction, be fined one hundred dollars for each offense

"Sec. 8. That all other ordinances or parts of ordinances in conflict or inconsistent with this ordinance are hereby repealed.

"Sec. 9. That this ordinance shall take effect and be in force from and after its passage.

"Approved February 14, 1901."

Appellees' criticism of this act is that it embraces a number of different offenses. We fail to see that that puts the ordinance in conflict with the section of the statute. The statute is that the ordinance shall embrace but one subject. In order to effectuate the object of this ordinance, which is covered by the one subject, viz., "to prevent the operation of poolrooms in Louisville," it may be necessary to deal with more than one feature of the subject. This is

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frequently so. In construing a similar constitutional provision (section 51), this court has had occasion to pass upon the subject of the sufficiency of the title. It has always been held that if the various provisions of the act all relate to, and are germane to, the subject expressed in the title, the requirement is satisfied. Collins v. Henderson, 11 Bush, 74; Commonwealth v. Bailey, 81 Ky., 395, 3 R., 110; Burnside v. Lincoln Co., 86 Ky., 423, 9 R., 635, 6 S. W., 276. The latest utterance of this court on that subject is the case of Weber v. Commonwealth, 24 R., 1726, 72 S. W., 30. The title of the act involved in that case was, in substance, the better preservation of the peace, and the suppression of mobs and other unlawful confederations. The first section of the act (Acts 1897, p. 29, c. 20) provided against persons banding themselves together for the purpose of injuring or disturbing another; the second, against those banding themselves together for the purpose of injuring property; the sixth, against those who send out intimidating or threatening letters. It was held that all the parts of the act related to the one subject named. A very similar question to the one under discussion came before the Supreme Court of Appeals of Virginia in the case of *Ex parte* Lacy, 24 S. E., 930, 31 L. R. A., 825, 57 Am. St. Rep., 795. The same point was made as to the title of the act of the Virginia Legislature, which was as follows: "An act to prevent pool selling, and so forth, upon the results of any trials of speed of any animals or beasts taking place without the limits of the Commonwealth." Acts 1895-96, p. 576, c. 539. The Virginia Constitution (art. 5, sec. 15) declared "that no law shall embrace more than one subject, which shall be expressed in its title." The court, on this point, observed: "We do not consider the act as obnoxious to that part of the clause or the Constitution just quoted,

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which says that 'no law shall embrace more than one subject.' The object of this law is the suppression of gambling, or that form of gambling where the bet or wager is made upon the speed or endurance or skill of animals or beasts, for, as was said in Ingles v. Straus, 91 Va., 209, 21 S. E., 490, 'if the subjects embraced by the act, but not specified in the title, have congruity or natural connection with the subject stated in the title or are cognate or germane thereto, the requirement of the Constitution is satisfied. . . .' The Constitution, moreover, is to be construed so as to uphold the law, if practicable. All that is required by the constitutional provision is that the subjects embraced in the statute, but not specified in the title, shall be congruous, and have natural connection with, or be germane to, the subject expressed in the title. Commonwealth v. Brown, 91 Va., 762, 21 S. E., 357, 28 L. R. A., 110." Every provision of this ordinance looks to the prevention of the operation of poolrooms in the city of Louisville. The great purpose of the act is to suppress that form of gambling known as "pool-selling." To do this the general council has struck at the operation of the poolrooms, as the most certain remedy. To prevent their operation, five classes of persons who are known to contribute thereto are brought within the terms of the ordinance, viz.: (1) The operator of the poolroom; (2) his servants or employes engaged in operating it; (3) the owner or controlling agent of the building or lot, who knowingly lets it or knowingly suffers it to be used for that purpose; (4) the telegraph, telephone, or messenger company, who, as carrier of messages, knowingly, and for the purpose of enabling the selling of pools, transmits or delivers messages to such operator, to be used at the poolroom, and (5) the person who buys or has the possession of the ticket of any pool, issued or to be redeemed

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by any poolroom operator in the city of Louisville. To reach any one of these classes, tends to "prevent the operation of poolrooms in the city of Louisville." To reach and restrain them all, effectually accomplishes the object of the ordinance. The title of the ordinance fairly and comprehensively embraces every phase of the subject treated of in its several sections, and is not repugnant to the statutes.

6. For appellee Smith, manager of the Western Union Telegraph Company, it is insisted that this ordinance is invalid because it is—so it is argued—an arbitrary and unauthorized interference with a legitimate business, to-wit, the contract and duty of a common carrier of messages to deliver the messages according to its contract. Counsel insist that an enforcement of section 4 of the ordinance is invalid, because: "(1) The prohibition is not limited to messages to be used in the business or operation of the poolroom. They may be entirely foreign to such business and operation, and still be a violation of the ordinance. (2) The message may be addressed to and delivered at a place separate from, and having no connection with, the poolroom. (3) The defendant may be guilty, under the ordinance, although he may not know the contents of the message. He may not know that it is to be used at a poolroom. He may not even know that the addressee is the owner or proprietor or agent or employe of a poolroom." No such construction of the ordinance is contended for by the city, nor do we believe that it is fairly susceptible of it. The messages which the telegraph and telephone companies and their employes are prohibited from delivering are those messages only that are communications "to any owner, proprietor, agent, or employe of any poolroom maintained, kept, operated, or conducted in the city of Louis-

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ville for any of the purposes defined in section 1 of this ordinance, any message, communication, or information to be used at such a poolroom as is defined in section 1 of this ordinance, concerning any horse race or races in or out of the city of Louisville." The message must contain matter which on its face shows it is to be used in the operation of a poolroom in Louisville by furnishing information concerning horse races that would enable the operator of the poolroom to make or sell pools or chances based upon such information, or the knowledge of such purpose must be otherwise established; and it must be shown that the message was delivered to such poolroom operator, or his agent, with knowledge of the purpose that it is to be used in making bets or selling pools on the information contained in the message. The telegraph company or its agents handling the message must be shown to have guilty knowledge that it is to be so used. Messages not concerning horse-racing and to further the pool-selling business are not affected by the ordinance.

It is not argued that the ordinance is invalid, as to this appellee, on any other ground than above named. The case of Commonwealth v. Western Union Telegraph Company (112 Ky., 355, 23 R., 1633), 67 S. W., 59, 57 L. R. A., 614, is relied on by appellee as sustaining this position. The question involved and decided in that case was whether a telegraph company that delivers such messages to an operator of a poolroom was guilty of the common-law offense of maintaining a nuisance. The court held: (1) "At common law a gaming house is a nuisance. It is detrimental to the public, because it promotes cheating and other corrupt practices. It encourages idleness and excites the desire to obtain money in an improper way. Persons who are in the occupation and control of such houses are guilty of

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maintaining a common nuisance." And (2) that a telegraph company who merely furnished messages to the proprietors of the gambling house were not "in control" or "occupation" of such house; that it was never, at common law, a nuisance to furnish such messages. Beyond that the court was not called upon to, and did not, decide. Certain expressions used in the opinion by way of illustration or argument seem to have misled counsel. For example, the court cited section 1346, Kentucky Statutes, 1899, which punishes telegraph companies by fine for corruptly or wilfully, or for any other improper motive, failing to deliver a message. The whole section is as follows: "If any agent, officer or manager of a telegraph or telephone line in this State, or other person, shall knowingly transmit, on or through the same, any false communication or intelligence with intention to injure any one, or to speculate on any article of merchandise, commerce or trade, or with intent that another may do so; or if any agent, officer, or manager of a telegraph or telephone line from corrupt or improper motives, or wilful negligence, shall withhold the transmission or delivery of messages or intelligence, for which the customary charges have been paid or tendered, he shall be fined not less than ten nor more than five hundred dollars." This section aimed at three things: (1) To punish a telegraph operator, or any one else, who knowingly sent false messages with intention to injure another; (2) to punish the operator or other person who transmits such telegraphic or telephone message for the purposes of speculation in articles of merchandise and commerce, and (3) to punish the operator who corruptly or by wilful negligence failed to deliver a message. Judge Paynter, in the opinion in Commonwealth v. Western Union Telegraph Company, *supra*, commenting upon the last-mentioned fea-

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ture of the statute, observed: "If a person desires to transmit a message over a telegraph line, if it is couched in decent language, it is the duty of the company to receive and transmit it upon the tender or payment of the customary charges for such services." Counsel for appellee construe this language to mean that a telegraph company is bound to, and therefore, of course, may voluntarily, accept and transmit any message couched in decent language, upon payment of customary charges. The same section expressly prohibits the transmission of two classes of messages, without regard to the absence or presence of terms that might shock the modesty, viz., false messages intended to injure another, and those for speculation upon the state of the markets. Of course, the opinion did not mean to hold that the last annulled the first two provisions of the statute. Nor did the court intend to subscribe to the doctrine that any one, whether a common carrier or not, could be compelled to do an unlawful act, or to become a party to an immoral one. The court did not intend to overrule the case of Smith v. Western Union Tel. Co., 84 Ky., 665, 8 R., 672, 2 S. W., 483, nor to depart from the principles therein announced. It was held in that case that a telegraph company would not be compelled by injunction to furnish service to one who purposed using it in gambling transactions with his customers. In the case of Com. v. W. U. T. Co., *supra*, the court merely announced that if the telegraph company did furnish such service, it was not an indictable offense at the common law. Since the decision in the Smith case, *supra*, section 1346, Kentucky Statutes, has made it an indictable offense for a telegraph company to furnish the character of information therein mentioned, viz., bucketshop quotations. It would be neither courteous nor fair to the legislative branch of the State government to impute

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to it, in construing one of its statutes, a purpose to encourage crime and foster immorality; to say that it had in mind the compulsion of acts by its citizens which had but the sole object of perpetrating other acts which in every enlightened jurisdiction are deemed vicious and degrading. To hold that the statute being considered compelled the transmission of messages by the telegraph company, known to be designed for purposes of gambling within this Commonwealth, would be to convict the Legislature of favoring the vice of gambling. On the contrary, the true rule of interpretation is that the purpose of the Legislature in passing such act will be presumed to be in harmony with the general public policy, evidenced by innumerable statutes against gambling in almost every conceivable form. A telegraph company, at common law, might become liable for the transmission of a libel, where the matter conveyed information of its nature. Whitfield v. S. E. R. Co., 1 El. B. & El., 115; Peterson v. W. U. T. Co., 72 Minn., 41, 74 N. W., 1022, 40 L. R. A., 661, 71 Am. St. Rep., 461; Monson v. Lathrop, 96 Wis., 386, 71 N. W., 596, 65 Am. St. Rep., 54; Archambault v. Great Northwestern Tel. Co., 4 Montreal, Q. B., 122. So a common carrier of messages is bound to transmit all messages upon payment of customary charges, when couched in decent terms, and which it is not prohibited by law from carrying, or which, if delivered, would not subject it to indictment or to an action for damages, or which are not intended for treasonable, unlawful, or immoral purposes, known to the carrier. The words, "if couched in decent language," used in Commonwealth v. W. U. T. Co., *supra*, are not in the statute, yet they are properly read into it, as should be the terms above used, for the policy of the law will not discriminate merely in the exclusion of

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words which might offend the sensibilities, yet allow matter obviously vicious and detrimental to society. State of Alabama v. Stripling (Ala.), 21 South., 409, 36 L. R. A., 81; Gray on Telegraphs, sec. 15; Melchert v. American Union Tel. Co. (C. C.), 11 Fed., 193; Bryant v. W. U. Tel. Co. (C. C.), 17 Fed., 825; Cothran v. W. U. Tel. Co., 83 Ga., 25, 9 S. E., 836. As said in the Smith case, *supra*, "Of course, a telegraph company, in assuming to refuse to send a message because it is illegal or immoral, acts upon its peril." Or as was observed in Gray v. Western Union Tel. Co., 87 Ga., 350, 13 S. E., 562, 14 L. R. A., 95, 27 Am. St. Rep., 259: "When a dispatch is ambiguous, the law would give the benefit of the ambiguity to the company dealing with it, either civilly or criminally, for transmitting the dispatch; and hence it would be the duty of the company, in deciding whether to transmit or not, to give the benefit of the doubt to the sender." But however the matter may be regarded in other respects, it is left, in this State, so far as the State policy is concerned, to the discretion of the telegraph company whether it will receive and transmit messages concerning gambling transactions, other than gambling in "futures." It was competent, then, for the general council of Louisville, in the exercise of that police power delegated to it by the State, to punish the willful transmission of messages furnished to known gambling establishments for the purpose of enabling them and their customers to make bets or lay wagers on horse races. The telegraph company, whether or not it has a conscience, has a duty. It it claimed that this duty is only to serve the public. Not so. Its first duty is to obey the laws, just like other people. The public can not demand a service which in and of itself involves a violation of the law. The ordinance is a clear exercise of police power, and not an improper one.

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7. The final contention of appellees is that the warrants in question are too indefinite, and fail to state any charge against any of appellees. By the warrants the defendants were summoned to show cause why they should not be fined "for violating ordinance to prevent the operation of poolrooms in the city of Louisville." It is complained that no acts are charged. There may be as many as five different offenses under this ordinance. The warrants in these cases do not describe any one of the offenses. In the recent case of Commonwealth v. Leak (decided Oct. 23, 1903), 116 Ky., 540, 25 R., 761, 76 S. W., 368, it was held: "The same technical strictness is not required in a proceeding by warrant as by indictment, and ordinarily a warrant in the form prescribed by the Code sufficiently describes the offense; but, if made to appear to the satisfaction of the court that a defendant can not intelligently make defense, it should be made more specific." In Commonwealth v. Robert Van Meter (M. S. opinion by Judge Cofer, decided in 1876), this court held that a warrant issued in a misdemeanor case, not requiring an indictment, could be amended, when it was not sufficiently specific, and that the amendment could be made in the circuit court after the appeal there, inasmuch as it would not have changed the prosecution. In these cases the warrants can be amended on their return to the circuit court, if demanded by appellees, so as to apprise them as to which sections of the ordinance they are charged with having violated. But it was error to have dismissed the warrants.

The judgments are reversed, and causes remanded to the circuit court for trial under proceedings not inconsistent herewith.

Whole court sitting.

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Judge O'Rear's response to a petition for a rehearing.

Aside from repetitions of arguments made on the original hearing of the case, and which we deem to have been disposed of by the opinion heretofore delivered in these cases, appellees have presented certain criticisms of the opinion, and additional reasons against the reversal, which ought to be noticed.

It is complained that the ordinance being considered is void because it violates section 168 of the Constitution, in this: That it provides less penalties than are fixed by statute for the same offense. It was argued before that the offense created by the ordinance was not an offense at all, either at the common law or by statute. The apparent inconsistency of the arguments will not estop counsel from relying on the true one, if either is sound. It is claimed that pool-selling is a game such as is embraced by section 1960, Kentucky Statutes, 1903, for which a penalty of $500 fine and confinement in the penitentiary, and disqualification from suffrage and office holding, is fixed. That section applies alone to the setting up and operation of a faro bank, keno bank, "or other machine and contrivance used in betting whereby money or other thing may be won or lost," and to whoever shall for commission or compensation set up, operate, or conduct a game of cards, oontz, or craps, whereby money or other thing may be won or lost, and to aiders and assisters. This argument is based upon the claim that the ordinance is broad enough in terms to include what is known as "French pools," and that as it was decided by this court in Commonwealth v. Simonds, 79 Ky., 618, 3 R., 380, that the selling of French pools or Paris mutuals on horse races is a felony, under section 1960, Kentucky Statutes, 1903, therefore the ordinance fixes a less

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penalty for selling French pools than the statute does. French pool or Paris mutual is a "machine or contrivance used in betting," as is shown by its description in Commonwealth v. Simonds, *supra*. Furthermore, section 1961, Kentucky Statutes, 1903, indicates that it was so regarded by the Legislature. For in that section it is said that the change of the name of the games or contrivances "mentioned or included in the preceding section shall not prevent the conviction of any person violating the provisions thereof. . . Nor shall its provisions apply to persons who sell combination or French pools on any regular race track during the races thereon." In French pool the operator of the machine does not bet at all. He merely conducts a game, which is played by the use of a certain machine, the effect of which is that all who buy pools on a given race bet as among themselves; the wagers of all constituting a pool going to the winner or winners. The operator receives 5 per cent. of the wagers as his commission. But in selling ordinary pools on horse races the seller does not operate a "machine or contrivance used in betting." Neither does he bet on a horse race. Such was the express decision of this court in Cheek v. Commonwealth, 79 Ky., 359, 2 R., 339. Therefore, as said by the court in that opinion, "there is no express statutory penalty against the specific act of selling pools." In that opinion the other statute refered to by counsel (what is now section 1960) was referred to, and held not to include pool selling, while French pool was held by the court in the Simonds case, *supra*, to be under that statute. But, even if the ordinance was broad enough to include French pools, it would be void only as to that class of pool selling, leaving it valid in all other particulars, including the penaties affixed to the acts of having tickets in possession, and knowingly furnishing telegraphic

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or telephone messages to the operators, etc., with the intention or knowledge that they are to be used to further the business of pool-selling in the city of Louisville.

Section 1978, Kentucky Statutes, 1903, fixes a penalty of $200 to $500 against "whoever shall suffer any game whatever at which money or property is bet, won or lost, in any house, or on premises in his occupation." It is claimed that the act of pool-selling, or at least the betting by the buyers of the pools, is a game. Both these contentions were decided adversely to appellees' present version in Cheek's case, *supra*, where the court said: "Appellant could not be convicted under an indictment for the statutory offense of betting at a game or wager, first, because he did not bet or wager anything; and, second, because betting on a horse race, although punishable under a statute against wagering, is not 'gaming.'"

The other criticism of appellees other than the Western Union Telegraph Company's manager do not appear to us to be material, as affecting their rights under the ordinance.

The very earnest petition for rehearing filed by the Western Union Telegraph Company for its manager, Smith, relies, as new matter, upon the argument that the ordinance must be held void because it is regulation of interstate commerce, and is therefore repugnant to the Federal Constitution. We are not aware that the Congress has ever legislated upon the subject-matter covered by this ordinance. It is conceded that the business of the Western Union Telegraph Company in carrying messages between persons of different States is interstate commerce. While the Supreme Court has frequently had before it the question of the power of a State to enact legislation regulating, or having the effect to regulate commerce between the

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States, it has not decided the precise point here presented. Nor can any general rule be deduced from the numerous decisions of that court that can be said to be conclusive of the question now presented. It is not for a moment thought that the ordinance in question was intended as a regulation of commerce between the States, or as a regulation of commerce at all. If it operates in that way, it is merely incidentally. The ordinance is an exercise of the State's police power. That the States may, in the exercise of that power, in certain instances, pass laws that incidentally affect commerce among the States, has been upheld. Plumley v. Massachusetts, 155 U. S., 461, 15 Sup. Ct., 154, 39 L. Ed., 223; Austin v. Tennessee, 179 U. S., 343, 21 Sup. Ct., 132, 45 L. Ed., 224; Western Union Tel. Co. v. James, 162 U. S., 650, 16 Sup. Ct., 934, 40 L. Ed., 1105; Patterson v. Kentucky, 97 U. S., 501, 24 L. Ed., 1115; Stone v. Mississippi, 101 U. S., 814, 25 L. Ed., 1079. It would be an extraordinarily unfortunate condition of it were otherwise. We should imagine that a rightful exercise of this power would be found in State laws prohibiting the importation from another State of diseased or infected cattle or persons, or impure food, and the like. Here the thing prohibited is the transmission to a poolroom operator in the city of Louisville of messages intended for use and to be used—in a vicious enterprise. Their use is that of gambling, and is universally held in this country to be immoral, degrading, and injurious to society. Such use can not have any legitimate purpose. The business of furnishing such messages, known to be intended solely for such use, makes the carrier essentially a partner in that offense. Its part of the profits of the business is its tolls for carrying the messages. The poolroom operator's part is a toll or percentage on the volume of business. It must be profitable to both, or it

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would not be kept up. The carrier wants us to say that its part in this unlawful partnership to violate the moral and statute laws of a community is protected by the Federal Constitution. As was said by one of the courts, the Constitution, at most, gives the Congress exclusive jurisdiction to regulate interstate commerce, not interstate crime. The liquor cases are cited by appellees as holding a contrary doctrine to this court's position. We do not understand that they do. Traffic in liquor is not illegal or immoral *per se*. On the contrary, it is generally recognized as being a legal business, and is licensed as such. Consequently the transmission of such commodities by freight from one State to another has been held to be a matter not subject to the prohibitive control of any of the States. But wagering bets on horse races can not be an article of commerce, no more than could be a lottery business. Both are *per se* immoral and deleterious to society, and clearly within the power of the States to prohibit. It could never have been contemplated by the framers of the Federal Constitution that the hands of the States were to be tied so that they could not protect themselves from such vices if one of the participants chanced to use an interstate vehicle of commerce for carrying on the business.

The petitions are overruled.

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CASE 88—ACTION BY ROSAMOND ERNST AGAINST THE CITY OF WEST COVINGTON FOR PERSONAL INJURIES.—NOV. 19.

116 850
135 575

Ernst v. City of West Covington.

APPEAL FROM KENTON CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

MUNICIPAL CORPORATIONS—REAL ESTATE—NEGLIGENT MAINTENANCE—PERSONAL INJURIES—PUBLIC SCHOOLS—PUBLIC PURPOSE.

Held: 1. A municipal corporation, having power to acquire and hold real estate, is exempt from liability for damages for personal injuries sustained by negligence in the maintenance of such property owned by it, which is in the possession and control of a common school district and used for school purposes, the building being owned not for private or municipal uses, but for a public purpose.

J. T. HANGER, W. McD. SHAW, FOR APPELLANT.

We submit that this case does not belong to the class of cases in which cities or school trustees that maintain and conduct schools out of funds derived for that especial purpose, are held to be exempt from liability, but that the city is liable because it owned property which it negligently permitted to be and remain in a dangerous condition, and permitted children to assemble on said property with the knowledge on the part of the city that it was in such condition.

AUTHORITIES CITED.

59 Nebraska, 84; 49 Nebraska, 849; Hill v. Boston, 122 Mass., 344; Kentucky Statutes, sec 4437; Downing v. Mason, 87 Ky., 208; Briegel v. Philadelphia, 135 Pa., 451, Whitman, &c. v. Warren, 23 R., 2120.

HALL & McLEAN, for appellee.

We contend that while it is true that appellee, as the owner of this real estate, owes it to the public to keep it in a condition so that it will not be dangerous to the general public,

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it is not its duty to keep it in a safe condition for the keeping of a public school.

It was the duty of the school authorities to maintain the school premises in safe condition, and this is a duty for the failure to perform which the school authorities can not be held liable.

AUTHORITIES CITED.

Shearman & Redfield on Negligence, sec. 267; Ford v. Kendal, &c., 121 Pa., 543; Bigelow v. Inhabitants of Randolph, 214 Gray, (Mass,), 541; Wixon v. Newport, 13 R. I., 454; Finch v. Board of Education of Toledo, 30, O. St., 37; Lane v. Township of Woodbury, 25 Ia., 462; Sullivan v. City of Boston, 126 Mass., 542; Howard v. Worcester, 153 Mass., 426.

OPINION OF THE COURT BY JUDGE PAYNTER—AFFIRMING.

West Covington is a city of the fifth class, with the power to acquire and hold real estate. It owned a two-story building situated within its corporate limits. The plaintiff's cause of action may be best stated by quoting from the petition as follows: "That said defendant permits said building to be used as a public school, which is attended by many children, residents of said city; said building is situated on said described ground fronting on Main street, and is about five or six feet back from the eastern boundary of said lot; that said above-described realty is about four or five feet above the grade of Main street and the sidewalk abutting said property; that the defendant had, long previous to the times herein mentioned, erected and constructed a stone wall on the eastern line of said property and adjoining the said sidewalk; that said wall was and is about four or five feet high, and the top of said stone wall was and is on a level with the said above-described property; the space between the building and said stone wall is paved with brick, and the school children all used this space as a passage to the back yard and a

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playground, which defendant and its officers and servants well knew, or ought to have known; that the said eastern boundary of said property was and had been for many months and for a long time in a dangerous condition in not having a fence or railing or some barrier along said eastern boundary, as defendant well knew, and that it was the duty of said defendant to place along the eastern boundary of said property a fence or railing or barrier to prevent children or persons from falling or being thrown over and upon the sidewalk below, and to thus protect children and persons using or passing over said property; that said defendant, its officers and agents, did wilfully, negligently, and carelessly fail to construct and erect any fence or railing or barrier on the top of said stone wall, or on any portion of the eastern line of said property, to prevent children or others from falling over same and upon the sidewalk beneath, and said defendant, its officers and agents, did wilfully, negligently, and carelessly permit said stone wall and the eastern part of said realty to remain for many months and years without any fence or railing or barriers which would prevent children and others from falling over same and upon the sidewalk below, and said defendant, its officers and agents and servants, well knew, or ought to have known, of the dangerous condition of the said eastern boundary of said property, and knew, or ought to have known, that no fence or railing or barrier was there at the time of the injuries herein complained of or had ever been there; that on or about the 4th day of October, 1901, plaintiff, Rosamond Ernst, was attending school at said building, as were numerous other children, and was rightfully on said property, and standing between said building and said stone wall, and nearer the wall than the building; that while so standing, and without fault on her part or on the part of

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her parents, she was run upon and against and jostled by another child or other children, and was violently thrown upon and over said stone wall, and upon the pavement below said stone wall, and her left arm was broken, fractured, and dislocated and injured at or near the elbow, and her right arm was badly bruised and injured." The property was in the possession of and in the control of the common school district in the city of West Covington. The injured child was attending the public school, and sustained the injury in the manner described in the petition. The question is, can the city of West Covington be held liable for the damages sustained?

The State regards it as her duty to establish and maintain a system of public education. When sums have been collected for that purpose they can not be diverted to any other use or purposes. If it could be done, the system would be injured and the public suffer incalculable injury. If some one is injured by the faulty construction of a public school building or the maintenance of the grounds, no action can be maintained against the district for such injury. The law provides no funds to meet such claims.

In Shearman & Redfield on Negligence, section 267, it is said: "The duty of providing means of education, at the public expense, by building and maintaining schoolhouses, employing teachers, etc., is purely public duty, in the discharge of which the local body, as the State's representatives, is exempt from corporate liability for the faulty construction or want of repair of its school building or the torts of its servants employed therein."

In Hill v. City of Boston, 122 Mass., 344, 23 Am. Rep., 332, the court held that there could be no recovery, and stated the facts as follows: "This was an action of tort against the city of Boston. Plaintiff, who sued by his

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next friend, offered to prove at the trial, in May, 1874, he was of the age of eighteen years, and was a pupil attending school in Boston, which was one of the public schools which the city was bound by law to keep and maintain; that this school was on the third floor of the building in which it was kept; that the staircase was winding, and the railing thereof so low as to be dangerous; that the city negligently constructed and maintained the building and authorized the public school to be kept therein; that the plaintiff while going to school, and being in the exercise of care, fell over the railing of the second flight of stairs, and was seriously injured. The plaintiff also offered to prove that the school committee of the city for a long time before the accident knew the building to be dangerous and unfit for the purpose of a public school, and had been notified by the teachers of the school of the dangerous condition, and had promised to repair same, and had neglected to do so."

The same court in Sullivan v. City of Boston, 126 Mass., 542, said: "As we have said before, the place where the injury happened was in the schoolhouse yard or lot, and, even if the city allowed this to be defective and dangerous, it is not liable therefor."

The same doctrine is recognized in Lane v. The District Township of Woodbury, 25 Iowa, 462, 12 N. W., 478; Howard v. Worcester, 153 Mass., 426, 27 N. E., 11, 12 L. R. A., 160, 25 Am. St. Rep., 651; Ford v. Kendal, &c., 121 Pa., 543, 15 Atl., 812, 1 L. R. A., 607.

In Wixon v. Newport, 13 R. I., 554, 43 Am. Rep., 35, the court said: "This is an action brought against the city of Newport by the plaintiff, a minor, suing by her next friend, to recover damages which she suffered by being scalded and burned in one of the public schools of the city,

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by the heating apparatus there used, which the declaration alleges was carelessly kept by the city in a defective, unsafe, and dangerous condition, without sufficient guarding and protection. . . . If we understand the case aright, the ground of exemption from liability is not that the duty or service is compulsory, but that it is public, and that a municipal corporation in performing it is acting for the State or public in a matter in which it has no private or corporate interest."

Counsel for appellant concedes the law to be as stated, but claims that the city was not required by law to furnish the building for common school purposes; that the city had nothing to do with the maintaining of the public school; that it occupies the same position with reference to the house and lot as if the building had been used for other purposes. Although the city was not compelled to furnish the school trustees with the building for public school purposes, still it did so, and made that contribution to the public to aid in the promotion of education. The use of the building accomplished the same purpose as it would have accomplished had it been owned by the common school district. The building was not owned by the city for private or municipal uses, but for a public purpose. We are of the opinion that the doctrine of the cases cited should apply to the facts of this case.

The judgment is affirmed.

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CASE 89—ACTION BY BARBER ASPHALT PAVING CO. AND OTHERS AGAINST L. & N. R. R. CO. TO SUBJECT ITS PROPERTY TO A CLAIM FOR STREET IMPROVEMENT.—NOV. 19.

116 856
d128 684

Louisville & N. R. R. Co., v. Barber Asphalt Paving Co., &c.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

JUDGMENT FOR PLAINTIFFS AND DEFENDANT APPEALS. AFFIRMED.

MUNICIPAL CORPORATIONS—BENEFIT ASSESSMENTS—RAILROAD RIGHT OF WAY—LIABILITY FOR ASSESSMENT.

Held: 1. A strip of land appropriated to use by a railroad as a perpetual right of way, and which is a lot within the statute governing street improvements, is liable for an assessment for a street improvement.

HELM, BRUCE & HELM, FOR APPELLANT.

WM. FURLONG AND B. F. WASHER, FOR APPELLEES.
(No briefs in the record.)

OPINION OF THE COURT BY JUDGE PAYNTER—AFFIRMING.

The appellant owns the perpetual right of way over a strip of land which parallels the street improved under the city ordinance. It is admitted by counsel that the facts of this case raise the question decided in Figg v. Louisville & Nashville R. R. Co. (116 Ky., 135, 25 R., 350), 75 S. W., 269. The opinion in that case reads as follows:

"The main line of the Louisville & Nashville Railroad Company runs southwardly from near Tenth and Broadway streets, Louisville, Kentucky, to and beyond Nashville, Tennessee. Its right of way is sixty feet in width. Under appropriate proceedings in the general council, Magnolia avenue was improved by original construction, and the taxing district was properly designated. Within that district

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east of Seventh street and south of Magnolia avenue is a parcel of land sixty feet wide, used by the appellee as a road-bed, or what is commonly called the right of way, and, as a part of it, a triangular parcel north of Magnolia avenue and east of Seventh street. . . . It is insisted on the behalf of the railroad company that (1) the property sought to be subjected to part of the cost of street improvement is only a right of way, and therefore can not be charged therewith; (2) it receives no benefit from the improvement; (3) the right of way is not a lot in the meaning of the statute governing street improvement. It is not the intangible right to use it, but the strip of land which the railroad company appropriates for its use, and upon which it builds its roadbed, that is its right of way. The railroad company has been in possession of the strip of land in question for fifty years. It is a part of a great railroad system. Its right of way is perpetual. In Elizabethtown, Lexington & Big Sandy R. R. Co. v. Combs, 10 Bush, 393, 19 Am. Rep., 67, the court held the injury resulting from the location of a railroad in such proximity to adjacent property so that smoke, soot, and fire from passing engines was thrown, blown into or upon it, entitled the owner to a single recovery, as the injury was permanent and enduring; in other words, the court regarded that the railroad had appropriated it for all time to come, and the injury would be permanent. It is the very remotest possibility imaginable that the appellee would ever abandon its right of way. The court concludes that its use of its right of way will be perpetual. It is therefore practically the owner of the land. If this strip of land was not occupied by the railroad company as a right of way, it would not be suggested that it was not subject to the special tax for street improvement. The purpose for which the lot is used can not affect

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the question of its liability for the cost of street improvement. Counsel for appellee calls attention to cases of other courts holding that rights of way can not be charged with the cost of street improvement; while, on the other hand, counsel for the appellants calls attention to cases of other courts holding that such rights of way are liable for such cost. It is not necessary to discuss this class of cases further, because this court in Louisville, Cincinnati & Lexington R. R. Co., and Louiville Railroad Transfer Co. v. Obst and Stengel, MSS. opinion February 23, 1875, and city of Ludlow v. Cincinnati Southern R. R. Co., 78 Ky., 357, held that such special taxation could be imposed.

"On the second question we quote from Preston v. Rudd, 84 Ky., 156, 7 R., 806, which reads as follows: 'Such assessments are made upon the assumption that a portion of the community are specially benefited by the improvement. The principle is that the territory is benefited; that it has a common interest, and that, governed by equitable rules, it must equally bear the burden. Necessarily, individual cases of hardship will arise, but it approaches equality as nearly as it is practicable. It follows that a lot owner may be compelled to pay his proportion of the cost of an improvement, although in his particular case his property may not be benefited. This rule, however, can not be so extended as to entirely take from the citizen his property. This would work "a manifest injustice." It would be spoliation, and not taxation. Under the guise of benefit and taxation, he can not be thus arbitrarily deprived of his property. It would be but an appropriation of it, by the exercise of arbitrary power, to public use, without compensation.' We do not understand that Barfield v. Gleason (111 Ky., 491, 23 R., 128), 63 S. W., 964, changes the rule announced in Preston v. Rudd, and other cases of this court. Spoliation is

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not shown in this case. Under the statute governing street improvement, a lot is any piece of land within the territory defined by the statute or the general council, where the territory to be assessed is not bounded by principal streets. The use or nonuse, or the character of the use to which the parcel of land is put, does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way was a lot in the meaning of the statute, and to thus appropriate it can not change its character."

The judgment is affirmed.

CASE 90—INDICTMENT AGAINT EB. MOREN FOR BREACH OF THE PEACE. —Nov. 20.

Moren v. Commonwealth.

APPEAL FROM LAUREL CIRCUIT COURT.

DEFENDANT CONVICTED AND APPEALS. AFFIRMED.

POLICE COURTS—JURISDICTION—EXCLUSIVENESS—CONCURRENT JURISDICTION—BY WHOM EXERCISED.

Held: 1. Where criminal jurisdiction is concurrent, the court which in good faith first begins prosecution obtains jurisdiction.

2. When construed with Const. section 143, providing for the establishment of police courts, with jurisdiction in cases of violation of municipal ordinances, and such criminal jurisdiction as appertains to justices of the peace, charters of third-class cities and sixth-class towns give police courts exclusive jurisdiction only in cases of violation of ordinances, and their criminal jurisdiction under general law is merely concurrent with that of the other courts.

SAM HARDIN, ATTORNEY FOR APPELLANT.

Appellant was indicted, tried and convicted in the Laurel

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circuit court, of the offense of a breach of the peace, and fined fifty-one dollars.

The offense was committed within the corporate limits of the town of London, a city of the sixth class in Laurel county.

He entered a plea to the jurisdiction of the Laurel circuit court, upon the ground that the said city of London had passed an ordinance against the offense of a breach of the peace which was in full force and effect at the time of the commission of the offense and at the time of the trial, which pleas was overruled by the circuit court.

We earnestly insist that when a town enacts an ordinance against an offense for which the statute provides, that the statute is suspended within said town, and the town has the exclusive jurisidiction of the offense committed within the corporation.

AUTHORITIES CITED.

Kentucky Statutes, secs. 966, 3513, 3710; Constitution, sec. 143; Commonwealth v. Wickersham, 17 Ky. Law Rep., 1713; Criminal Code, sec. 13, subsec. 3.

C. J. PRATT, ATTORNEY GENERAL, AND M. R. TODD, FOR APPELLEE.

In Commonwealth v. Wickersham, 17 R., 1713, this court decided the question as to the meaning and proper construction to be given to the language of the statute, wherein it is said, "He (police judge) shall have exclusive jurisdiction of all offenses or causes arising out of ordinances enacted by the council for the enforcement of the powers granted them by law," and that language was construed to confer exclusive jurisdiction on the police court of offenses and causes which "have their origin or existence by virtue of ordinances applicable to the municipality and independent of any statute of the State."

Manifestly, this meaning was adopted by the framers of the present Constitution, section 143, which provides: "A police court may be established in each city and town in this State, with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the city or town in which it is established, and such criminal jurisdiction within the said limits as justice of the peace have." Commonwealth v. Hunton, 19 R., 1109.

OPINION OF THE COURT BY JUDGE NUNN—AFFIRMING.

The appellant appeals from a judgment of the Laurel

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Circuit Court rendered against him on an indictment charging him with a breach of the peace, amounting to $51. The appellant on the trial introduced an ordinance passed by the trustees of the town of London, a sixth-class town, fixing the same penalty for a breach of the peace as that fixed by the statutes. All the evidence showed that the offense for which the appellant was tried in the circuit court was committed within the city limits of London. At the conclusion of the evidence the appellant moved the court to give a peremptory instruction upon the theory that the charter of sixth-class towns gave to the police court exclusive jurisdiction of this offense. The court refused to give the instruction, and of this appellant complains.

We are of the opinion that the lower court was right. The cases of Commonwealth of Ky. v. Wickersham, 99 Ky., 21, 17 R., 1317, 34 S. W., 707, City of Owensboro v. Simms, 99 Ky., 49, 17 R., 1393, 34 S. W., 1085, and Commonwealth of Ky. v. Hunter (19 R., 1109), 41 S. W., 284, conclusively settle this question.

In addition to the reasons given in these cases, we may also add that the charter gives to the police court exclusive jurisdiction for the enforcement of all ordinances of the town, and concurrent jurisdiction with justices of the peace, circuit courts, and county courts for the enforcement of the criminal law within its limited jurisdiction. The circuit court in the case before us was not attempting to enforce an ordinance of the town of London. It had no jurisdiction, except on appeal, to enforce such an ordinance, because such jurisdiction was exclusively given to the police court; but by the statutes and section 143 of the Constitution it had concurrent jurisdiction with the police court for the trial of such an offense as charged. Where the jurisdiction is concurrent, as in this case, that court

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which, having jurisdiction of the subject-matter and in good faith, first begins the prosecution for the enforcement of the law, gets jurisdiction of the case. Under section 168 of the Constitution, if the appellant had been tried under the ordinance it would have been a bar to a trial under the statutes and vice versa.

The appellant contends that there is a distinction between the powers given police judges in cities of the third class, under which the opinions above referred to were rendered, and the powers given police judges in sixth-class towns. Reading the charters of cities of the third class and towns of the sixth class, and construing them in connection with section 143 of the Constitution, they are only given exclusive jurisdiction to enforce all ordinances and concurrent jurisdiction with other courts in the enforcement of general laws within the territorial limits prescribed by statutes.

Wherefore the judgment of the lower court is affirmed.

CASE 91—ACTION OF JOHN G. WEISIGER AND OTHERS AGAINST MARY A. MCDONALD AND OTHERS, TO RECOVER THE ESTATE OF THEIR DECEASED NIECE, LUCILE WEISIGER.—NOV. 24.

Weisiger, &c., v. McDonald, &c.

116 862
[136 25

APPEAL FROM BOYLE CIRCUIT COURT.

FROM A JUDGMENT IN FAVOR OF DEFENDANTS, PLAINTIFFS APPEAL. REVERSED.

DESCENT—PROCEEDS OF THE SALE OF REAL ESTATE—CONVERSION—PARTIES—DISMISSAL.

Held: 1. Kentucky Statutes, 1899, section 1401, provides that if an infant die without issue, having the title to real estate by descent from one parent, the whole shall descend to that parent

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and his or her kindred. Civil Code Prac., ch. 14, section 494, subsec. 6, relating to the sale of real estate of persons under disability, provides that if the owner of real estate which has been sold under the provisions of the chapter die during infancy the person who would have been entitled to the property shall be entitled to the proceeds. One died in infancy leaving the proceeds of sale of real estate inherited from her father. HELD, that her paternal uncles and aunts were entitled to the proceeds, to the exclusion of her mother.

2. Where defendant had illegally converted the proceeds of her infant daughter's real estate, the persons entitled thereto had a right to sue defendant alone to recover it, and to dismiss as to others whom they had sued with her.

ROBT. HARDING, ATTORNEY FOR APPELLANTS.

Joseph A. Weisiger died in 1890, intestate, leaving a widow now the appellee, Mary A. McDonald, and an infant daughter, Lucile Weisiger, who died in infancy.

The deceased Joseph A. Weisiger, owned several tracts of land in Garrard county, in part of which his widow owned a joint interest. The appellant, John G. Weisiger, was appointed guardian for the infant, Lucile. Before the remarriage of the widow and before the death of the infant Lucile, in a suit brought by the guardian, all the real estate owned by deceased Joseph A. Weisiger, including that in which his widow owned a joint interest, was sold at public sale, and, after paying the widow her share of the proceeds of her individual interest in the land, including the money value of her dower interest in that which belonged to her deceased husband, the balance of the proceeds of the land was paid over to W. H. Kinnaird, the statutory guardian of Lucile. At the death of Lucile, said Kinnaird qualified as her administrator. He was also administrator of the estate of Joseph A. Weisiger. Kinnaird, as administrator of said Lucile, demanded of her guardian, John G. Weisiger, all the proceeds of the sale of said land belonging to the infant Lucile, who paid him the same, amounting to $5,320.33.

The plaintiffs in this suit, who are appellants herein, are the brothers and sisters of Joseph A. Weisiger, deceased, and brought this suit against the widow of deceased, now Mary A. McDonald, J. G. Weisiger, the guardian of Lucile, and W. H. Kinnaird, the administrator of decedent, Joseph A. and the administrator of Lucile Weisiger, deceased, in which they claim the proceeds of the sale of the land belonging to said decedent, Joseph A. Weisiger, setting out all the facts herein recited,

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to which petition the lower court sustained a demurrer on the ground that the plaintiffs, as the brothers and sisters of Joseph A. Weisiger are not entitled to said proceeds, but, on the death of the infant, Lucile, the same descended to her mother, now Mrs. McDonald.

The appellants make the following contentions:

1. That the master commissioner improperly and without any authority to do so, paid this money to the guardian, who improperly paid same to the administrator, and he improperly paid same over to appellee, Mrs. McDonald.

2. The appellee, Mrs. McDonald, wrongfully received and converted this money to her own use and is liable to appellants therefor, because the infant Lucile, having died during infancy, and without issue, the land she inherited from her father would have descended to her uncles and aunts, and the land having been sold, they are entitled to the proceeds of the sale in preference to Lucile's mother.

AUTHORITIES CITED.

Kentucky Statutes, sec. 1401; Powers v. Daugherty, 83 Ky., 178; Civil Code, sec. 494, subsec. 6; Thompson v. Pettibone, 79 Ky., 32; Ware v. Palhill, 11 Ves. J. R.; Powers, Eq. Jurisprudence, (2d ed.), sec. 1167; *In re* Stewart, 1 Swake & G., 32, 39; *In re* Harap, 3 Drew, 726; Kellard v. Fullford, L. R., 6 ch. Dia., 491; *In re* Keggs, 2 De Gex, &c. 5, 553; Richards v. Atty. Genl., 6 Moore, P. C. C., 381.

R. P. JACOBS AND WILLIAM HERNDON, FOR APPELLEES.

We contend:

1. The court must get its information upon which it acts, from the pleadings and not from the exhibits filed.

2. Every essential averment required to make a declaration good at common law, must, under the code, upon general demurrer, be made in the petition.

3. Defects in the petition can not be cured by statements in a paper filed with and as a part of the petition though it be the foundation of the action.

If subsection 6 of section 494 of the Civil Code, is valid, it does not apply to funds—proceeds—however they may arise, which have been paid to the guardian for general purposes or for any purpose, before the death of the infant.

5. Said subsection, if valid, was repealed by what is now section 1403 of Kentucky Statutes.

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6. Said subsection was never valid; it is contrary to the Constitution.

7. The provisions of the Code which undertake to provide how the proceeds of land sold under section 494, shall descend, are purely remedial and in contravention of a plain statute on the same subject, and we contend that the statute should prevail.

AUTHORITIES.

Code, sec. 120; 11 Ency. Plead. & Prac., 1143; Cox v. Farley, 2 Wes. L. M., 315; Judd v. Dean, 2 Disney, 210; Fordice v. Marks, 1 Am. L. Rec. (O.) 257, 2 Am. L. Rec. (O.) 392; Becknell v. Becknell, 110 Ind., 42; Wilson v. Banks, 55 Ind., 584; 11 Am. & Eng. Cyc. Plead. & Prac., 1144; Hill v. Barnett, 14 B. M., 84; Gibhard v. Garnier, 12 Bush, 325; Murphy v. Estes, 6 Bush, 533; Green v. Page, 88 Ky., 307; Huffaker v. National Bank of Monticello, 12 Bush, 287; 3 Am. & Eng. Plead. & Prac., 362 and note 4; Power v. Power, 12 Rep., 793; Malone v. Conn, 95 Ky., 93; Sawyer v. Guscurth, 3 Rep., 592; Code, sec. 494, subsec. 6; Collins v. Champ, 15 B. M., 118; Acts of 1891-2-3, p. 1377; Genl. Stats. subsec. 1, ch. 11, ch. 31; Broaddus v. Broaddus, 10 Bush, 308; Parish v. Ferguson, 83 Ky., 18; Am. & Eng. Ency. of Law, 483, 487; Keene v. Tilford, 81 Ky., 607; Lawson's Rights and Remedies.

OPINION OF THE COURT BY JUDGE SETTLE—REVERSING.

Joe Weisiger died in Garrard county, this State, December, 1893, intestate, but was survived by his wife, Mary Kinnaird Weisiger, and an infant daughter, Lucile Weisiger. His widow afterwards intermarried with one —— McDonald, with whom she is still living, their place of residence being in Boyle county. Soon after the death of the intestate, his brother, John G. Weisiger, was, by an order of the Garrard County Court, appointed, and at once gave bond and duly qualified, as the statutory guardian of the infant, Lucile Weisiger, who was then under fourteen years of age. Subsequently, Lucile Weisiger, while yet an infant, died in Garrard county, intestate, unmarried, and without issue; and thereafter W. H. Kinnaird, by an order of the Garrard County Court,

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was appointed and duly qualified as administrator of her estate. At the time of his death Joe Weisiger owned in fee and was in the possession of the following parcels of real estate, lying in and near the city of Lancaster, Garrard county: First, the undivided half of a house and lot fronting on Lexington street, the other half being owned by his then wife, now Mary McDonald; secondly, a lot adjoining the one last mentioned, containing a half acre; thirdly, a lot adjoining the half acre last named, and containing about three acres; fourthly, a lot adjoining the last one, containing three rods and one pole; fifthly, a storehouse and lot known as lot No. 3 on the plat of the city of Lancaster; sixthly, two other adjoining tracts, one containing twenty, and the other forty, acres, less one and three-quarters acres conveyed by a former owner to H. M. Naylor. The two parcels last mentioned were owned jointly by the intestate and Jno. E. Stormes. At the death of the intestate, the real estate, and all interest therein, owned by him, descended to his infant daughter, Lucile Weisiger, as his only heir at law subject to the dower of the widow, now Mary McDonald.

After the death of Joe Weisiger, and before the death of his infant daughter, her statutory guardian, John G. Weisiger, instituted an action in the Garrard Circuit Court in which she, her mother, W. H. Kinnaird, administrator of the estate of Joe Weisiger, deceased, and J. E. Stormes, joint owner of a part of the real estate mentioned, were made defendants, the objects of the action being to obtain a decree for the sale of all the real estate and interest therein owned by Joe Weisiger at the time of his death. It was averred, in substance, in the petition in that case that the lots could not be divided without materially impairing their value, and that it would be impossible, in view of their char-

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acter and location, to allot dower to the widow so as to make the same remunerative to her, or what would be left to the infant, after the allotment of dower, remunerative to her, but that it would be beneficial to all the parties in interest to sell the lots separately, or in connected parcels, and pay to the widow her half of the proceeds of the residence lot and the value of her dower in the remainder, and to Stormes his half of the proceeds of the two parcels owned by him jointly with the infant daughter of the intestate, which would leave to the latter the remainder as her share of the proceeds of sale.

After all the parties to the action were brought before the court a decree was entered by the chancellor directing the sale in one body of the residence lot on Lexington street, on the usual terms, and after the customary advertisement. The decree further directed that one half the proceeds realized from the sale of the residence lot be paid to the widow, and that she also be paid the money value of her dower out of the other half, and that the remainder, which would be going to the infant, should not be paid by the purchaser, but remain a lien on the realty until she became twenty-one years of age, or until the execution by her guardian of the proper bond, as required by section 493, Civil Code Practice. The decree further directed that the residue of the realty be not sold until ordered by the court.

At the succeeding term of the court a further decree was entered, wherein it was adjudged that the residue of the realty be sold, for the reason that it could not be divided without materially impairing its value and the value of each share, and that the best interest of the infant required that it be sold for a reinvestment of her share of the proceeds as provided by law.

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At the same term of the court John G. Weisiger, guardian of the infant, Lucile Weisiger, executed bond, with good security, as provided by section 493 of the Code in the case of sales of the real estate of infants, which was duly accepted and approved by the court. The sales ordered by both decrees of the court were duly made by the master commissioner as therein directed, and his reports thereof, upon being filed, were approved by the court, and from his report of the first sale it appears that Mary McDonald, widow of the intestate, became the purchaser of the dwelling house and lot sold under the first decree at the price of $3,500. For this sum she executed bond, with good security, which she upon its maturity paid in full, and $1,386.65 thereof went into the hands of the guardian of the infant, which sum was her share of the proceeds arising from the sale of the dwelling house and lot after the widow was paid her half of the entire proceeds and the value of her dower in the infant's half. From the report of the second sale made by the commissioner it appears that the residue of the intestate's real estate brought the sum of $5,002, and that after paying Stormes his half of what was realized from the sale of the two parcels of which he was a joint owner with the intestate, and paying to the widow the value of her dower in the remainder, there was left to the infant $3,933.68, which sum was also paid to her guardian. It further appears that after the sums realized from the sales of the real estate of the infant, Lucile Weisiger, had been paid to her guardian, and before any steps had been or could be taken by him or by the court to reinvest the same, her death occurred; following which her administrator, W. H. Kinnaird, whose appointment and qualification as such has already been recited, demanded of her guardian the sums of money which he had received for

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his ward from the sales of the real estate, and the latter thereupon paid the administrator the sums so received and held by him, amounting in the aggregate to $5,320.33. Thereafter suit was brought in the Boyle Circuit Court by the appellants, John G. Weisiger, M. C. Weisiger, Emma Weisiger, Lucy W. Harding (formerly Lucy Weisiger), and her husband, Samuel Harding, against the appellees, Mary McDonald, and W. H. Kinnaird, administrator of the estate of Lucile Weisiger, deceased, to recover of them the amount paid by J. C. Weisiger, as guardian of Lucile Weisiger, to the administrator of the latter's estate. It is alleged in the petition that the father and mother of Joe Weisiger, deceased, are both long since dead, and that the appellants J. C. and M. C. Weisiger are brothers, and the appellants Emma M. Weisiger and Lucy Harding, sisters of Joe Weisiger, deceased, and that the four named are his only surviving brothers and sisters, and were the only uncles and aunts and heirs at law of his daughter Lucile Weisiger, deceased, and that by reason of her death in infancy, and the fact that all the real estate owned by her descended to her from her father, the proceeds thereof that were paid to the administrator by her guardian descended to them under and by virtue of section 1401, Kentucky Statutes, 1899. It is further averred in the petition that the administrator, after collecting the proceeds of the infant's real estate from the guardian, unlawfully paid it all over to Mary McDonald, mother of the infant; that the latter has wrongfully converted it to her own use, and now holds it without right, and refuses to pay it to the appellants; and they prayed judgment against her and the administrator for the amount thus converted by them.

The appellee filed a demurrer to the petition, which was

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sustained by the lower court, and the petition dismissed, and from that judgment this appeal was taken.

Section 1401, Kentucky Statutes, 1899, provides that "if an infant dies without issue, having the title to real estate derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and his or her kindred as hereinbefore directed, if there is any; and if none, then in like manner to the other parent and his or her kindred; but the kindred of one shall not be so excluded by the kindred of the other parent, if the latter is more remote than the grandfather, grandmother, uncles and aunts, of the intestate and their descendants."

It is conceded by the appellees that if the real estate that descended to the infant, Lucile Weisiger, upon the death of her father, had remained unsold, it would, under the statute, *supra*, have gone at her death to the appellants; but they contend that inasmuch as it was converted into money before her death, it became and must be treated as personalty, and that as subsection 1 of section 1403, Kentucky Statutes, 1899, directs that "the personal estate of an infant shall be distributed as if he had died after full age," the same went to the mother at the death of the infant, and is consequently rightfully held by her.

In construing section 1401 of the statute, *supra*, this court, in Talbot v. Talbot, 17 B. Mon., 1, held that "the purpose of the Legislature (in enacting it) was to limit the descent of the real estate of an infant dying without issue to that side of the house from which it came;" and in Powers v. Dougherty, 83 Ky., 187, 7 R., 54, it was also held that "if an infant dies without issue, having title to real estate derived from one of his parents, the whole descends to the kindred of that parent, provided such kindred are not more remote than the grandparents, uncles, and aunts

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of the infant." Indeed, in the absence of any authoritative statement from this court, the language of the statute itself clearly manifests that such is the disposition to be made of the real estate of an infant dying without issue.

Subsection 6, section 494, chapter 14, Civil Code Practice, relating to the sale of the real estate of persons under disability, expressly provides that "if the owner of real estate which has been sold under the provisions of this chapter die during infancy, or being of unsound mind die intestate, or being an adult married woman die without having received the proceeds of sale, upon her written request, and upon privy examination as is authorized by this chapter, or without disposing in the manner authorized by law of the property in which the proceeds may have been invested, the person who would have been entitled to the property if it had not been sold, shall be entitled to the proceeds, or to the property in which they have been invested." This provision of the Code is, in our opinion, conclusive of the question in issue in the case at bar. The real estate of the infant was sold under chapter 14, Civil Code Practice, according to the terms of the judgment, for a reinvestment of the proceeds for the infant's benefit; but before the reinvestment was made the infant died. In contemplation of law the proceeds of her real estate were still under the control of the chancellor at the time of her death, though in the hands of her guardian, and under the provision of the Code, *supra*, they must go to the appellants, as they are the persons who would have been entitled to the property if it had not been sold. In Pomeroy's Equity Jurisprudence, sec. 1167 (2d Ed.), under the head "Compulsory Sales of Land under Statute, or by Order of Court," it is said: "Where land is purchased or taken under compulsory powers conferred by statute, and the owner is *sui juris*, a con-

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version is effected. The purchase money, although not yet paid, becomes to all intents personalty. But if the owner is an infant or lunatic, or the land is in settlement, the purchase money remains land; there is no conversion." The payment by the commissioner of the proceeds of the infant's real estate to her guardian was without an order from the lower court, and without authority of law, as was the payment of the same by the infant's guardian to the administrator of her estate, and manifestly the latter was equally without authority to pay such proceeds to the mother of the infant. Wherefore the judgment is reversed, and cause remanded to the lower court, with directions to overrule the demurrer and for further proceedings consistent with the opinion herein.

Response to petition for rehearing by Judge Settle:

The question is made by the petition for rehearing that W. H. Kinnaird, administrator of Lucile Weisiger, deceased, is not a party to this appeal. We find on page 30 of the record an order which dismissed him as a party to the action, and this order was, of course, entered by the lower court before the appeal was taken. We were led to think him a party to the appeal, as his name appears as a party in the statement filed with the record naming the parties to the appeal. It is, however, not material to the decision of the appeal by this court that he should have been a party to the record. Appellants, upon the ground that Mary A. McDonald had illegally received and converted the proceeds of her infant daughter's real estate to which they were entitled, no matter by whom paid to her, had the right to sue her alone to recover it, or to dismiss others whom they had sued with her, and seek a recovery against her alone. The judgment and opinion of this court can not,

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of course, affect Kinnaird, as he was dismissed from the case in the court below

A careful examination of the petition for rehearing has failed to indicate to our minds any error in the conclusions expressed in the opinion herein, wherefore the opinion is modified to the extent of declaring that it does not apply to Kinnaird, and the petition for rehearing is overruled.

CASE 92—ACTION BY HERMAN PETZOLD AGAINST E. W. WILSON AND OTHERS TO ENFORCE A MORTGAGE ON LAND.—NOV. 24.

Wilson, &c., v. Petzold.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

LULA BENTLEY PURCHASED LAND AT DECRETAL SALE, AND FROM AN ORDER CONFIRMING THE SALE, SHE AND DEFENDANTS APPEAL. AFFIRMED.

FORECLOSURE SALE—NOTICE—PUBLICATION IN DAILY PAPER.

Held: 1. Where a decree directs a sale of mortgaged property to satisfy the debt, and requires an advertisement of the sale in a certain paper for three consecutive days next preceding the day of sale, in compliance with Act March 24, 1902 (Acts 1902, p. 213, c. 92), an advertisement on Thursday, Friday and Saturday in a paper published daily except Sunday, where the sale was made on the following Monday, was sufficient.

M. A., D. A., AND J. G. SACHS AND DAVID SACHS LEVY, FOR APPELLANTS.

POINTS AND AUTHORITIES.

1. Act of Legislature regulating public advertising found on page 213 of the Acts of 1902, and construction thereof. *Daily*, Webster's definition thereof and meaning as used in the act. *Next*, Webster's definition thereof and meaning as used in the act, section 460, Kentucky Statutes. Clark on Interpretation of Laws, pp. 36-7-8-9, etc.; Endlich on Interpretation of Stat-

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utes, secs. 4, 5, 6, 7; Senate Journal for 1902, p. 545; House Journal for 1902, p. 1214.

2. Distinction where Sunday is, in a series of days for the doing of an act required to be done in court, and when the act does not so have to be done. Long v. Hughes, 1 Duvall, p. 387.

3. Sunday is, nevertheless, a day, although it may not be a judicial day and legal advertisements and notices may be published on that day. Medland v. Linton, 60 Neb., p. 251; City of Knoxville v. Knoxville Water Works, 64 S. W. Rep., p. 1076; Kingsburry v. Buckner, 70 Ill., 514; Taylor v. Palmer, 31 Cal., p. 240; Miles v. McDermott, 31 Cal., p. 271; Clapton v. Taylor, 49 Missouri App., p. 126; Savings, &c. v. Thompson, 32 Cal., 347; Gordon v. People, 154 Ill., 664; City of St. Joseph v. Landis, 54 Miss. App., 315; Ormsby v. City of Louisville, 79 Ky., 202, holds that the publication of notices on Sunday is good, when Sunday is one of a series of days on which the advertisement is made, but not good when Sunday is the only day on which the publication is made, or when Sunday is the first day of the series on which the advertisement is made; and that case, in effect, holds that each publication through a series of days is not a separate act, but the publication is one continuous act as of the day of the first publication.

4. The act of the commissioner in advertising and making a judicial sale is purely a ministerial act and in no way a judicial one.

5. Distinction between judicial and ministerial acts on non-judicial days.

Ministerial acts can be performed on Sundays, holidays and all days that are *dies non juridicus*, where judicial acts could not be. McNally's Case, 9 Coke, p. 166; Commonwealth v. Marrow, 3 Brewster (Penn.), 419; Kiger v. Coates, 18 Ind., 153; Hadley v. Musselman, 104 Ind., 459; *In re* Worthington, 7 Bissell (U. S., Cir.), 455; Hanover Fire Ins. Co. v. Shrader, 30 Law Rep. Ann., 498; Matthews v. Ansley, 31 Ala., 20.

6. Advertisement or publication of notice on Sunday, where it is an intervening day in a series of days on which the advertisement is to be made, is good. Kingsburry v. Buckner. 70 Ill., 514; Taylor v. Palmer, 31 Cal., 240; Miles v. McDermott, 31 Cal., 271; Gordon v. People, 154 Ill., 664; City of St. Joseph v. Landis, 54 Missouri App., 315; Ormsby v. City of Louisville, 79 Ky., 202.

7. Publication of notice on Sunday, where Sunday is the last day of the series, is good. Clapton v. Taylor, 49 Missouri App., 126; Savings, &c. v. Thompson, 32 Cal., 347; See

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Knoxville v. Knoxville Water Co., 64 S. W. Rep., 1076; Ormsby v. City of Louisville, 79 Ky., 202.

8. Sunday newspapers have become a necessity in modern times and should be excepted on that account, like railroads, from the operation of the so-called Sunday laws, and therefore notices published in Sunday newspapers should be held good. Commonwealth v. L. & N. R. R., 80 Ky., 295; Commonwealth v. Matthews, 152 Penn., 166.

LIEBER & LINCOLN, ATTORNEYS FOR APPELLEE.

STATEMENT.

This action was instituted in the Jefferson circuit court in May, 1902 by the appellee, Herman Petzold, to enforce a mortgage on real estate in the city of Louisville, executed by the appellants, E. W. Wilson and wife.

Final judgment was entered October 25, 1902, directing a sale of the mortgaged property to satisfy the debt, and requiring notice of the sale to be given by printed hand-bills, and also by advertisement in the Louisville Evening Times *for three consecutive days next preceding the day of sale*, in compliance with the act of March 24, 1902. The advertisement was had in the Louisville Evening Times on Thursday, Friday and Saturday (November 6th, 7th and 8th), and the sale was made November 10, 1902, thus excluding Sunday. Lula Bentley became the purchaser at the sale, but refused to comply, assigning as grounds therefor:

1. That the sale was not advertised for three days next preceding the day of sale as required by law; and

2. and 3. That certain special tax liens existed against the property sold, the holders of which were not made parties defendant.

The court, upon due notice, summarily ascertained these special taxes under the statute (Kentucky Statutes, sec. 989), overruled the exceptions and confirmed the sale.

This involves, First, the constitutionality of the act of March 24, 1902, and if constitutional, then, Second, Is the advertisement made a compliance with the requirements of said act?

POINTS AND AUTHORITIES.

1. The act of March 24, 1902, is unconstitutional because the subject matter of the act is not expressed in the title. (Constitution, sec. 51.)

2. But, assuming that the act of March 24, 1902, is consti-

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tutional, it has no application to judicial sales in Jefferson county, as newspaper advertisement of such sales is provided for by the provisions of the special act governing "courts having continuous sessions" (Act Dec. 30, 1892, now sec. 1011, Kentucky Statutes), enacted under the express authority of the Constitution. (Constitution, sec. 59, subsec. 1.)

3. But, assuming that the act of March 24, 1902, is constitutional and applies to "courts having continuous sessions," we maintain that the advertisement in this case is in accordance with the requirements of the statute, because,

(1) *a.* All servile work is forbidden on Sunday. (Kentucky Statutes, sec. 1321); Smith v. Wilcox, 24 N. Y., 353; Murphy v. Simpson, 14 B. Mon., 337; Slade v. Arnold, 14 B. Mon., 232.

(2) *b.* Publication and distribution of newspapers on Sunday is servile work and within the prohibition of the statute. Commonwealth v. Matthews, 152 Penn. St., 166.

Therefore, publication on Sunday, being forbidden by express statute, can not be included in the *"three consecutive days next preceding,"* where the sale is required by law to be made on a Monday. Brannin v. City of Louisville, MSS. Opin., Apr. 12, 1881, (2 Ky. R., 384); Redd Bros v. Johnson, MSS. Opin., 1880; Ormsby v. City of Louisville, 79 Ky., 201; Shaw v. Williams, 87 Ind., 158; Scammon v. Chicago, 40 Ills., 146; Sewall v. St. Paul, 20 Minn., 511; Sawyer v. Cargile, 72 Ga., 290.

(2) *a.* A "daily newspaper," according to the accepted rule of the entire newspaper profession, is "a newspaper published *six secular days in each week*," and this definition is recognized and enforced by the courts. Richardson v. Tobin, 45 Cal., 30; Railton v. Lander, 126 Ill., 219; Scammon v. Chicago, 40 Ills., 146.

b. The act of March 24, 1902, requires the advertisement to be published in a *"daily newspaper"* for *three consecutive days next,"* etc.

Therefore, the Sunday issue being no part of the "daily newspaper," in order to comply with the law requiring publication in a "daily," the advertisement must be had on *Thursday, Friday* and *Saturday*, where the sale is made on Monday. Scammon v. Chicago, 40 Ills., 150.

The question involved is of the most serious moment, as the act in question requires the annual expenditure of large sums of money for advertising, without apparent benefit either to the creditor or the debtor defendant.

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OPINION OF THE COURT BY JUDGE NUNN—AFFIRMING.

This action was instituted in the Jefferson Circuit Court in May, 1902, by the appellee, Herman Petzold, to enforce a mortgage on real estate in the city of Louisville executed by the appellants E. W. Wilson and wife. Final judgment was entered October 25, 1902, directing a sale of the mortgaged property to satisfy the debt, and requiring notice of the sale to be given by printed handbills, and also by advertisements in the Louisville Evening Times for three consecutive days next preceding the day of sale, in compliance with the act of March 24, 1902 (Acts 1902, p. 213, c. 92). The advertisement was properly made by handbills, and was also advertised in the Louisville Evening Times on Thursday, Friday, and Saturday, November 6th, 7th, and 8th; and the sale was made November 10, 1902, thus excluding Sunday. One of the appellants, Lula Bently, became the purchaser at the sale, but refused to comply, assigning as grounds therefor, first, that the sale was not advertised for three days next preceding the day of sale, as required by law; second, that certain special tax liens existed against the property sold, the holders of which were not made parties defendant. The court, upon due notice, summarily ascertained these special taxes and liens under the statute (Ky. St., 1899, sec. 989), overruled the exceptions, and confirmed the sale.

The only question to be determined by the court upon this appeal is whether or not the publication of this advertisement of sale in the Louisville Evening Times on Thursday, Friday, and Saturday next preceding the day of sale, on Monday, was in compliance with the requirements of the statutes. It is contended by the appellants that it was not a compliance; that the advertisement should have been

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in a Sunday issue, to have met the requirements, and the Louisville Evening Times, by reason of its not being published on Sunday, was and is not a daily paper. We are of the opinion that it was and is a daily paper, within the meaning of the statutes. It is agreed that it was issued every day of the week except Sunday. If this be true, it was a daily newspaper, within the meaning of the statutes, which employs the term "daily newspaper" in contradistinction to the term "weekly," "semiweekly," or "triweekly" newspaper. The term was and is to be used in its usual and proper sense, and, in this sense, it is clear that a paper which according to its usual custom is published every day of the week, except one, is a daily paper. Otherwise a paper which is published every day except Sunday would not be a daily newspaper. The term in its proper sense, does not admit of this construction. The Legislature, in the enactment of this statute, certainly did not mean that no paper was a daily paper except those published seven days in the week. See Richardson v. Tobin, 45 Cal., 30, and Ormsby v. City of Louisville, 79 Ky., 201, 2 R., 297.

In our opinion, the publication in the Times of this sale on the last three secular days next preceding the day of sale was a sufficient compliance with the act in question, and the sale was legal in all respects. Having arrived at this conclusion, we deem it unnecessary to consider the many other questions raised and discussed by the parties in their briefs. Wherefore the judgment of the lower court is affirmed.

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CASE 93—ACTION BY CLAUDE THOMAS AGAINST F. & C. RAILWAY COMPANY FOR THE POSSESSION OF CERTAIN CATTLE.—NOV. 24.

Thomas v. Frankfort & Cincinnati Ry. Co.

APPEAL FROM BOURBON CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

RAILROADS—FREIGHT CHARGES—CONTRACT—RATIFICATION—LIEN—CHARGES ADVANCED—NEGLIGENCE OF CONNECTING CARRIER.

Held: 1. The acceptance by a railroad company of cars of freight from the initial carrier thereof does not operate as a ratification of an oral contract between the initial carrier and the consignor to carry the goods for less than the usual rate.

2. Where a common carrier accepts freight without special contract as to the rate to be charged, the law implies an undertaking to charge the usual rate.

3. A carrier has a lien on freight transported by it for the usual charges of such transportation.

4. A common carrier's lien for charges of transportation includes charges which it may have advanced to a preceding carrier.

5. A common carrier's lien for transportation charges is not affected by the fact that the previous carrier has been in default by reason of damage to the goods.

6. In the absence of a special contract to deliver freight at a point beyond its line, a common carrier is not liable for negligence occurring after its delivery of the freight to a connecting carrier.

MCMILLAN & TALBOTT FOR APPELLANT.

The plaintiff contends:

1. That the court erred in sustaining a demurrer to his reply which contained a traverse of material allegations in the answer—for example, a traverse of the allegation that appellee had paid freight charges to its connecting railroad line.

2. That the court erred in disregarding the reply (treating it on demurrer as utterly ineffectual for any purpose) and in rendering judgment for appellee without any proof in the face of such denial or traverse in the reply.

3. That the court erred in sustaining a demurrer to his reply and rejecting the whole of the reply when it set up affirm

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atively that by contract it was not to pay more than $180 for freight charges.

4. That the court erred in not treating so much of the reply as set out the contract of shipment and the breach thereof as a defense to the claim for freight, at least to the amount of such freight.

5. The court erred in rendering personal judgment when there was no allegation showing a personal liability.

6. The answer is more in the nature of a set-off than a counterclaim, and a counterclaim in the reply was therefore permissible, hence not only damages to the amount of the freight, but all of the damages that could be established should have been considered.

7. The counterclaim or set-off in the answer should not be allowed in an action of this nature and the appellee should be limited to alleging and showing his freight lien merely for the purpose of defeating the action for immediate possession.

8. Even if such a counterclaim or set-off can be allowed in an action of this nature, the counterclaim or set-off herein is bad on demurrer in failing to set out the contract of shipment and performance thereof.

Wherefore, appellant prays a reversal of the judgment herein, for costs and all proper relief.

AUTHORITIES.

1. For a case pleading a counterclaim against a counterclaim, see Nutter against Johnson, 80 Ky., 426.

2. Misnomer in calling a set-off a counterclaim or a counter-claim a set-off, does not affect the rights of the parties. Civil Code, sec. 97, subsec. 4.

3. For authority to the effect that appellant had the right to allege and prove the contract of shipment and the violation thereof as a defense against appellee's claim for freight charges, and that to the extent of such freight charges such contention of appellant was defensive only and not in reality a counterclaim and set-off. See quotation in brief from Boggs & Russell against Martin, 13 B. Monroe, 242.

D. W. LINDSEY, JOHN B. LINDSEY AND JOHN S. SMITH, ATTORNEYS FOR APPELLEES.

1. The contract of shipment is not questioned, and hence is obligatory on the plaintiff.

2. Plaintiff had to comply with his contract including the payment of the freight charges against the cattle before he

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could demand their possession or aver a breach of the contract by any of the railway companies.

3. A railroad company in possession of freight, in delivering it to a connecting line, acts as the agent of the consignee who can not question the act of the connecting line in the pre-payment of the charges on receiving the freight, and the carrier had a lien on the freight for its own charges and for those it advanced.

AUTHORITIES.

1. Validity of the contract of carriage. Adams Express Co. v. Loeb, 7 Bush, 500; L. & N. R. R. Co. v. Brownlee, 14 Bush, 590; Southerland v. National Bank, 75 Ky., 250.

2. Any right of action of appellant is only under the contract of carriage. Smith v. Lewis, 3 B. M., 231.

3. That the C. N. O. & T. P. R. R. Co., was agent of plaintiff. L. & N. R. R. Co. v. Spalding, 7 Ky. Law Rep., 211.

4. That defendant had lien on the cattle for all freight charges. Caye v. Pools, assignee., 21 Ky. Law Rep., 1600.

5. That defendant's counterclaim was correctly plead. Civil Code, sec. 96, subsec. 1.

6. That there can be no counterclaim in a reply to a counterclaim in answer. Civil Code, sec. 111, subsecs. 2, 3; Procter v. Johnson, 16 Ky. Law Rep., 60; Mount v. L. & N. R. R. Co., 2 Ky. Law Rep., 221; Brown v. Phillips, 3 Bush, 356.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—AFFIRMING.

This action was instituted by the appellant, Claude M. Thomas, against the appellee, the Frankfort & Cincinnati Railway Company, under section 181 of the Civil Code, for the possession of 116 head of feeding cattle, which he alleged were wrongfully detained from him, and for $100 in damages. The defendant answered on December 6, 1897, that at 8:30 a. m. the plaintiff, through his agent, the Cincinnati, New Orleans & Texas Pacific Railway Company, delivered to it at Georgetown, Ky., in the usual course of business, three cars of cattle to be shipped over its line to Paris, Ky.; that it paid the agent to the plaintiff $201 freight reported to be due thereon; that it transported the

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three cars over its line from Georgetown to Paris, their destination, and that its charges were $12, which had never been paid; and that it had a lien for the $201 paid to the Cincinnati, New Orleans & Texas Pacific Railway Company, and for its own charges, amounting in the aggregate to $213; and that it had refused to surrender the possession of the cattle until this amount was paid—and asked that it be adjudged a lien upon the cattle, and for a sale of a sufficient number to satisfy its bill. The plaintiff replied that on the 2d day of December, 1897, he had contracted with the Memphis & Charlestown Railroad Company to transport from Decatur, Ala., to Paris, Ky., over its own and connecting lines, 116 head of cattle, which were to be shipped in three cars at the agreed price of $60 per car load, or $180 for all; that the cattle were to be delivered at Paris, Ky., on Friday, December 3, 1897; that either the Memphis & Charlestown Railroad Company was authorized to make this contract for a through shipment by its connecting lines, or that the connecting lines, by acceptance of the freight, ratified the contract made with him by the Memphis & Charlestown Railroad Company; that the delivery of the cattle to him at Paris, Ky., had been delayed between fifty and sixty hours in excess of the time agreed upon; and that during this interval they had suffered from want of food and water to such an extent as to damage them at least $250, which he pleaded by way of set-off and counterclaim. Plaintiff filed with his reply, and as a part thereof, a bill of lading, which was delivered to him by the Memphis & Charlestown Railroad Company on the delivery of the cattle to them, and which contains the following stipulation: "I agree that the said Memphis and Charlestown R. R. Co. is only bound to carry said live stock to its freight station at ——, and there have the same ready to be de-

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livered and unloaded by the consignee or upon his orders, or to such company or carrier (if the same is to be forwarded beyond said station) whose lines may be considered as forming a part of the route to the destination to which said stock is consigned; and I expressly agree that the responsibility and liability of said Memphis and Charlestown R. R. Co., and any and all connecting lines or companies as common carriers shall cease at the end of their respective roads or routes. . . . I further agree that I will load, unload or transfer said stock at my own risk and expense, and that in the event of accidents or delays from any cause whatever, I will, at my own expense, feed, water and take care of said stock, or cause the same to be done for me." The bill of lading does not set out the alleged or any agreement as to the price for which the cattle were to be transported. The defendant filed a general demurrer to the reply, which was sustained, and, plaintiff declining to plead further, judgment was entered for the defendant, and plaintiff has appealed.

The reply contains no allegation that the Frankfort & Cincinnati Railroad Company ever authorized the Memphis & Charleston Railroad Company to contract for it for a through rate on the stock at $60 a car from Decatur to Paris, or that it had any knowledge of such alleged contract when it received these cars from the Cincinnati, New Orleans & Texas Pacific Railway Company at Georgetown, Ky. And there is certainly nothing in the mere acceptance by them of these cars to authorize the inference that it ratified the alleged parol contract for a through rate of $180, as it had no right, under the law, to refuse to receive from a connecting line cars of such line loaded with freight which is ordinarily transported between railroad companies according to the proper and usual course of bus-

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iness. 5 Encyl. of Law (2d Ed.), 160, and authorities there cited. As the bill of lading is silent as to the charges at which the stock was to be transported, and appellee had no information of the alleged special parol contract, the law implies an undertaking to carry at the usual and ordinary rate for which such services are performed, and there is no allegation in the reply that the charge of $213 was in excess of the usual and ordinary rate. See Georgia R. Co. v. Murray (Ga.), 11 S. E., 779. And a carrier has a lien on freight transported by it for the usual customary charges of such transportation. And this lien covers charges which a connecting carrier has advanced to the preceding carrier. See 6 Cyc., 502; Caye v. Pool's Assignee (108 Ky., 124, 21 R., 1600), 55 S. W., 887, 49 L. R. A., 251. Nor will the lien be affected by the fact that the previous carrier has been in default by reason of damage to the goods. See Bowman v. Hilton, 11 Ohio, 303, and Ray on Negligence of Imposed Duties, 864. There is no allegation of negligence on the part of appellee after the receipt by them of the cars from either connecting carrier at Georgetown, Ky. Besides, the claim for damages in this case is based upon the alleged contract of the Memphis & Charlestown Railroad Company to deliver the cattle in Paris, Ky., on Friday, December 3, 1897, whilst the bill of lading, which is made a part of the reply, contains no such stipulation, but only undertakes to carry the cars to the end of their line and deliver them to the connecting carrier. The law is well settled that in the absence of a special contract by the carrier to deliver stock at a point beyond its line, it is not liable for negligence after its delivery to the connecting carrier. See L. & N. R. Co. v. Cooper (19 R., 1152), 42 S. W., 1134; Bryan v. M. & P. R. Co., 74 Ky., 597; L. & N. R. Co. v. Tarter (19 R., 229), 39 S. W., 698; Elliott on Railroads, sec. 433; Ire-

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land v. Mobile & Ohio R. Co., 105 Ky., 400, 20 R., 1586, 49 S. W., 188, 453. In the case of Boogs, &c., v. Martin, 52 Ky., 239, the entire shipment was by one vessel from New Orleans to Louisville. There was no question of the payment by the delivering carrier of charges to the preceding carrier, and therefore has not application to the facts of this case. But it was there held that a carrier had a lien on goods carried, which he might detain until the freight was paid.

For reasons indicated, the judgment is affirmed.

CASE 94—ACTION BY W. W. MAYDWELL, AND OTHERS AGAINST THE CITY OF LOUISVILLE, TO ENJOIN THE COLLECTION OF A TAX FOR SPRINKLING STREETS OF THE CITY.—NOV. 25.

116 885
f129 610
j129 622

Maydwell, &c., v. City of Louisville.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION

JUDGMENT FOR DEFENDANT AND PLAINTIFFS APPEAL. AFFIRMED.

CITIES—TAXATION—STREET SPRINKLING—PUBLIC PURPOSE.

Held: 1. The sprinkling of city streets, being necessary to preserve the public health and comfort, is a public purpose; and hence an ordinance levying a tax for street sprinkling purposes is not unconstitutional, under Const., section 171, providing that taxes shall be levied and collected for public purposes only.

LANE & HARRISON, ATTORNEYS FOR APPELLANT.
(No brief by appellant.)

H. L. STONE, CITY ATTORNEY, FOR APPELLEE.

1. The levy of a tax for sprinkling streets is valid, because for a public or governmental purpose.

2. The contract made by the board of public works and approved by the general council, was a proper exercise of the powers vested in them.

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AUTHORITIES CITED.

Clark v. Louisville, 90 Ky., 520; City of Dayton v. Bellevue Water Co., &c., 20 R., 104; McDonald v. City of Louisville, 24 R., 271; Cooley on Taxation, 3d ed., vol. 1, pp. 84, 165, also vol, 2, p. 1178; City of Owensboro v. Com., 20 R., 1281; Kentucky Statutes, sec. 2825.

OPINION OF THE COURT BY JUDGE BARKER—AFFIRMING.

The appellants, who are citizens and taxpayers of Louisville, Ky. (a city of the first class), instituted this action for the purpose of enjoining the collection and disbursement of a tax of three cents on each $100 worth of taxable property for the purpose of sprinkling the streets of the city. They claim the sprinkling of the streets is not a public purpose, and that, therefore, so much of the ordinance as provides for the tax is unconstitutional and void. This is the question involved in this litigation.

Section 171 of the Constitution provides: "The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws." Section 181: "The General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. . . ." These two sections comprise the constitutional provisions regulating the subject in hand. The charter provisions applicable to the question are as follows:

"Sec. 2980. Each city shall raise a revenue from ad va-

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lorem taxes, and a poll tax and license fees, and to that end the common council of each city is hereby authorized and empowered to provide each year, by ordinance, for the assessment of all real and personal estate within the corporate limits thereof subject to taxation for State purposes, and shall levy an ad valorem tax on same, not exceeding the rate and limits prescribed in the Constitution, and for school purposes not exceeding fifty cents on each one hundred dollars of taxable property therein, or such portion of poll tax or license fees as the council may designate; to levy a poll tax not exceeding one dollar and fifty cents on each adult male inhabitant thereof. . . .

"Sec. 2981. In the ordinance fixing for any year the tax rate, the general council shall subdivide its levy as follows: A levy for schools, a levy for the sinking fund, a levy for police purposes, a levy for the fire department, a levy for street and sewer cleaning, a levy for sprinkling streets, a levy for reconstruction of streets, a levy for street repairs, a levy for construction and repairs of sewers, a levy for the house of reform, a levy for charitable institutions, a levy for parks, a levy for library purposes, and a levy for general purposes and a deficit tax. The council shall cause the foregoing levies to be made for the purpose stated by an ordinance fixing the tax rate each year."

"Sec. 2825. The board of public works shall have exclusive control over the construction, reconstruction, cleaning, repairing, platting, grading, improving, sprinkling, lighting and using of all streets, alleys, avenues, lanes, market-houses, bridges, sewers, drains, wells, cisterns, ditches, culverts, canals, streams and water courses, sidewalks, curbing and the lighting of public places."

It will thus be seen that there is ample statutory author-

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ity to uphold the sprinkling of the municipal highways at the public expense.

The Constitution forbids the collection of any tax except for a public purpose. Is the sprinkling of the streets a public purpose? If so, the city has a right to collect the tax; if not, the ordinance, to the extent to which it authorizes a levy for this purpose, is void. Cooley, in his work on Taxation (3d Ed.), vol. 1, p. 211, says: "It is not doubted that the preservation of the public health is a public purpose of prime importance. Sanitary regulations are indispensable in large towns, but they may be made for every locality. The right to provide for draining low lands for the purpose is well settled, and the right to protect low lands from overflow may also be justified on the same reason."

It can not be doubted, at this day, that whatever is necessary for the preservation of the public health and safety is a public purpose, within the meaning of section 171 of the Constitution. For the purpose of furnishing the citizens with pure water, waterworks may be established, and public wells dug and maintained. That the public highways may, without peril, be traveled at night, they may be lighted at the public expense. That the people may have convenient and wholesome places for resort, public parks may be established and kept. For the education of the young, public schools are conducted. For the support of the indigent aged, almshouses are provided. For the reformation of vicious youth, reformatories are maintained. For the relief of the sick, hospitals are provided. For the protection of the public health, nuisances are abated, streets and sewers are flushed and cleaned. As a protection against conflagration, fire departments are established; and as a safeguard for life and property, police departments are

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organized. It can not be successfully denied that the dust upon the streets of large cities is a fruitful source of disease, as well as of annoyance, to the citizens. The same principle which authorizes the streets to be cleaned for the purpose of preventing noisome odors and epidemics of disease authorizes them to be sprinkled.

The cases cited by counsel for appellants are not pertinent to the question in issue. Clark v. Louisville Water Company (90 Ky., 515; 12 R., 309) 14 S.W., 502, establishes the principle that the property of that corporation is subject to State taxation; but it does not thereby follow that the city may not contract with the corporation for the furnishing to its citizens pure water. This reasoning on the part of counsel confounds the public service with the instrumentalities by which that service is effectuated. Whatever public service the municipal corporation may itself perform it may hire others to perform for it, if it appears that the latter method is the cheapest and the best, unless there be some constitutional or statutory inhibition. In the case of City of Louisville v. Commonwealth, 1 Duv., 295, 85 Am. Dec., 624, it was held that the fire engines of the city of Louisville were not exempt from State taxation; but no one has ever doubted that the maintenance of a fire department for the purpose of preventing conflagrations is a public service, or that the levy of taxes for its maintenance is authorized.

It is the duty of cities to clean its public highways, that they may not become a nuisance. If, in their wisdom, they see fit to hire others to perform this service, it does not follow that the carts used by the contractors are exempt from taxation; nor can it be deduced therefrom that because they are not exempt the cleaning of the streets is not a public service. And yet this is the sole contention of

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appellants. Logic could not be more faulty or inconsequential. The Louisville Tramway Company is a corporation organized for the purpose of sprinkling the public streets more rapidly and cheaply, by utilizing the street car tracks, than could otherwise be done. We are able to perceive no reason why the municipality may not contract with it to perform this service, so essential to the health, happiness, and convenience of all its citizens.

The owners of property abutting upon the highways sprinkled may get some local advantage distinguishable from that of the traveling public; but this always happens in the performance of public duties. If a park is established, those who own property near by enjoy an increased value thereof by reason of its proximity to the public pleasure ground; but it does not follow that the establishing of parks is any less a public purpose for this reason. The establishing of a State college in a given city affords that city a local advantage not enjoyed by other cities of the Commonwealth; but no one would question that education is a public purpose because of this fact. All the citizens have a right to travel the public streets, and, in order that their health and convenience may be conserved, the city may provide that they are reasonably safe, clean, and free from substances deleterious to the public health.

As sprinkling the public ways clearly comes within the constitutional requirement of a public purpose, the judgment of the lower court dismissing the petition seeking to enjoin the levy and collection of the tax for that purpose is affirmed.

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CASE 95—ACTION BY WILLIAM GOODWIN AGAINST DAVIESS COUNTY AND OTHERS, TO ENJOIN THE PAYMENT OF A SALARY TO THE COUNTY JUDGE AS ROAD SUPERVISOR.—DEC. 1.

116 891
e121 481

116 891
e129 54

116 891
f135 286

116 891
138 70
138 681

Daviess County, &c., v. Goodwin.

APPEAL FROM DAVIESS CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT, HASKINS, APPEALS. AFFIRMED.

ROAD SUPERVISOR—COUNTY JUDGE—ELIGIBILITY TO OFFICE—TAXPAYER—RIGHT TO MAINTAIN SUIT—FISCAL COURT—AUTHORITY.

Held: 1. Kentucky Statutes, 1899, sections 4306, 4339, relative to roads, vest the control of roads in the fiscal court. The general scheme there provided is for the appointment of a supervisor, whose duty it is to report to the county judge under whose immediate control he is placed, and in whose court he must execute bond, and from whose court warrants may issue for violations of duties by the supervisor. In many instances the concurrent action of the county judge and supervisor is required, and in case of a vacancy in the supervisor's office the county judge may appoint some one to fill it until the next term of the fiscal court. HELD, that it was contemplated by the statute that the county judge and supervisor should be different persons, although, under section 4315, it is provided that the fiscal court, instead of appointing the supervisor, may authorize the county judge to let out the working of roads, the other duties of the office being discharged by road overseers, in which case, however, the county judge acts as judge, and not as supervisor, and is entitled to no additional compensation for his services.

2. The fiscal court is a body of limited authority, and its action in appointing a county judge as supervisor of roads is void, and vests in the judge no right to the office.

3. A citizen and taxpayer of a county suing for himself and all other taxpayers may, as such, maintain an action to prevent the payment to the county judge of a salary as supervisor of roads, to which office he was illegally appointed by the fiscal court.

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C. S. WALKER, ATTORNEY FOR APPELLANTS.

SYNOPSIS.

1. There is no incompatibility between the offices of county judge and road supervisor, and where there is no supervisor, the county judge may be authorized by the fiscal court to discharge certain specified duties of the road supervisor, in which case he and the road overseers perform all the functions of the office, or he may be appointed by the fiscal court to the position of road supervisor, which is, strictly speaking, not an office, but an employment, and whether so authorized to act or so appointed, he is entitled to receive the compensation provided for the service by the statute. Kentucky Statutes secs. 4306, 4307, 4308, 4313, 4315, 4323, 4344, 4346, 4314, 4317, 4312, 4318, 4309, 4311; People v. Green, 58 N. Y., 304, 305; Throop on Public Officers, sec. 34; 23 Am. & Eng. Ency. Law, (2d ed.), 333.

2. Section 1072, Kentucky Statutes, was intended to be a reproduction of section 11, ch. 28, art. 17, of the General Statutes, the former being a mere collection of laws, while the latter has been adopted by an act of the Legislature as the law of the State. O'Mahoney v. Bullock, 97 Ky., 781; Acts, 1887, 1888, vol. 1, p. 84.

The county judge does not receive a salary, but "an allowance commensurate to the character and quality of the services performed," and where he is authorized to perform the functions of road supervisor, he is entitled to the compensation provided for such extra services whether they be regarded as having been performed *ex officio*, or under a distinct and independent authorization or employment. Kentucky Statutes, secs. 1072, 4346; Gen. Stats., sec. 11, ch. 28, art. 17; Ohio County Court v. Newton, 79 Ky., 268, 269; *In re* Conrad, 15 Fed. Rep., 642, 643; 23 Am. & Eng. Ency. Law, (2d ed.), 392; Converse v. U. S., 21 How., (U. S.), 469; City of Covington v. Mayberry, 9 Bush, 304; Badeau v. U. S., 130 U. S., 451; U. S. v. Brindle, 110 U. S., 694; U. S. v. Saunders, 120 U. S., 129, 130; U. S. v. Fillebrown, 7 Pet., (U. S.), 28; U. S. v. Harsha, 56 Fed. Rep., 953; Board of Education v. Moore, 24 Ky. Law Rep., 1480.

The constitutional provisions, secs. 161, 235, and opinions in Jefferson County v. Waters, 24 Ky. Law Rep., 816; Board, &c. v. Moore, Id., 1478; Commonwealth v. Carter, 21 Id., 1509; Morgantown Deposit Bank v. Johnson, 22 Id., 210, have no bearing.

3. If the offices or positions are incompatible, the acceptance by Haskins of that of road supervisor operated a vacation of

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his office of county judge, and he is entitled to the compensation allowed him as road supervisor. Kentucky Statutes, sec. 3744; Goodloe v. Fox, 96 Ky., 630; Stubbs v. Lee (64 Me., 195), 18 Am. Rep., 253.

4. The right of a public officer to the compensation of his office, is incident to and dependent upon his title to the office, and if consitutionally ineligible, he can not recover for services. 23 Am. & Eng. Ency. Law, (2d ed.), 396, 397.

In the present case, according to the decision of the court below, there was no *de jure* supervisor of roads, and Haskins was a mere *de facto* supervisor, in which case he is entitled to compensation as incident to the rendition of services. 8 Am. & Eng. Ency. Law, (2d ed.), 813; Behan v. Prison Comrs., 31 Pac. Rep., 521; Miller v. Seney, 81 Ga., 489; Gorman v. Boise County, 1 Idaho, 655; State v. Draper, 48 Mo., 213; State v. Clark, 52 Mo., 508; State v. John, 81 Mo., 13; Dickerson v. Butler, 27 Mo. App., 9; Erwin v. Jersey City, 60 N. J. L., 141; Henderson v. Glynn, 2 Colo. App., 303; Duncan v. Lucas, 83 Ky., 468.

5. An injunction restraining the person in possession from exercising the functions, or receiving the compensation of an office will not lie, and the only proceeding to try the title to an office in this State is the statutory one, and the title can not be inquired into in any other proceeding. Throop on Public Officers, sec. 850; 8 Am. & Eng. Ency. Law, (2d. ed.), 826; Civil Code, secs. 480, 483, 487; Hagner v. Heyberger, (7 Watts & Sergeant, 104), 42 Am. Dec., 221, 222, 223, 224.

6. An action to try the title to office can only be brought by the person entitled thereto or the Commonwealth. Civil Code, secs. 480, 483, 487; Tillman v. Otter, 93 Ky., 604, 605; Toney v. Harris, 85 Ky., 463, 464; 30 Am. Dec., 49.

If the present action were authorized, it could not be maintained by appellee as a mere taxpayer. Civil Code, sec. 25; 15 Ency. Plead. & Prac., 642, *et seq.:* Oswald v. Morris, 92 Ky., 51; Throop on Public Officers, sec. 851.

7. The levy authorized by Kentucky Statutes, sec. 4307, is all that the fiscal court is required to do to work the roads by taxation.

8. The judgment in the present case is a determination collaterally of the title to an office, and an interference with the proceedings of a subordinate tribunal which possessed judicial discretion in the matter involved, and is unauthorized. 7 Am. & Eng. Ency. Law, (2d. ed.), 999, 1000, 996-998, and notes, 937; Shinkle v. City of Covington, 83 Ky., 429; 23 Am. & Eng. Ency. Law, (2d ed.), 372.

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9. Money paid a county officer, not authorized by the statutes or Constitution, may be recovered back, and the right of action is primarily in the county. 7 Am. & Eng. Ency. Law, (2d. ed.), 960, 961, and notes; Howard v. Deposit Bank, 80 Ky., 496.

ADDITIONAL SYNOPSIS.

Section 25 of the Civil Code, is the same as the modern common law, (Hendrix v. Money, 1 Bush, 308; 15 Ency. Pl. & Pr., 627, *et seq.*, and note on 629), and under it, a mere citizen and taxpayer can not challenge the acts of the authority of the fiscal court of a county, unless he can show a direct pecuniary interest arising from his taxes being increased. State, *ex rel.* Saunders v. Kohnke (109 La.), 33 Southern Reporter, 793, 797-8.

LA VEGA CLEMENTS, ATTORNEY FOR DAVIESS COUNTY, AND C. W. BRANSFORD, TREASURER.

THE QUESTION.

The only question to be determined by this appeal is, whether or not the county judge, whose salary has been fixed by the fiscal court, can be appointed road supervisor and draw an additional salary as such supervisor in addition to his salary as county judge. In the determination of this question neither Daviess county nor C. W. Bransford, treasurer of said county, has any pecuniary interests, but are only interested in the legal determination of the question so that the funds of the county shall be paid out according to law. I am not attempting to argue either side of the contention, but will make a few suggestions on the points which arise and are to be determined in this action.

Section 161 of the Constitution of Kentucky, provides that the salary of no county official shall be increased or diminished during his term of office. It might be said that the salary of the county judge having been fixed, that any additional salary as road supervisor would be an increase of his salary, and prohibited by said section. The fact that the salary of the county judge was fixed after his induction into office, rather than before his election and qualification may not vary the rule, as this court has decided that where the salary of a county judge had not been fixed before he took his oath of office, but afterward had the same effect as though it had been fixed prior to his election and qualification.

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I call your Honors' attention to the case of Jefferson County v. Waters, 24 Ky. Law Rep., p. 816, and also, Board of Education of the City of Lexington v. Moore, 24 Ky. Law Rep., p. 1478, in which questions similar to the one at bar are discussed. I trust that the court will decide this appeal irrespective of technicalities, so that the officials of Daviess county and other counties may be rightfully guided in matters of similar nature that may arise in the future.

W. SCOTT MORRISON, ATTORNEY FOR APPELLEE.

SYNOPSIS.

1. The appellee who sues for himself and all other taxpayers of Daviess county, shows by his petition and amended petition that he is the owner of property in said county subject to taxation, and the county failing to institute this action and being made a party defendant, the appelleee shows himself entitled to institute and maintain this action. High on Injunctions, vol. 2, (2d ed.), secs. 1298-99, 1300, Harvey v. Indianapolis R. R. Co., (32 Indiana, 244), Sinclair v. Board of County Commissioners, American State Reports, vol. 23, 694; Alkison and Others v. Louisville, Harrods Creek and Westport R. R. Co., 9 Bush, p. 250; Crampton v. Zabriskie, U. S. Report, 101, p. 1070; Dillon's Municipal Corporations (3d ed.), vol. 2, secs. 914-922, subsecs. 1, 2, 3; Cooley on Taxation, p. 169 (2d. ed.)

2. There is no question of incompatibility of office presented in this record, nor any attempt to enjoin maintaining the public roads of the county by taxation.

3. Chapter 110, title, "Roads and Passways," section 4287 to 4347, Kentucky Statutes, both inclusive, contain all the provisions of the statute with reference to establishing, maintaining and keeping in repair the roads and bridges of the county, as well as the particular manner of the exercise of the jurisdiction of the fiscal court over the same. Chapter 110, Kentucky Statutes, sec. 4287 to 4347, both inclusive.

4. The statute does not confer authority upon the fiscal court in its discretion to appoint the county judge road supervisor, but, on the contrary, the authority is limited to authorizing the county judge to let out the working of the roads and building and repairing of bridges, and to take and approve the bonds of the contractors. Sec. 4315, Kentucky Statutes.

5. The order of the fiscal court of date, January 27, 1902, (Record 9), fixing the salary of appellant, Haskins, as county judge at 1,000 per annum, was the fixing of his salary for his

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entire term of office, and this $1,000 per annum is the full compensation for all the services he can perform as county judge. Sec. 161 of the Constitution; Jefferson County v. Waters, Ky. Law Rep., vol. 24, p. 816; Board of Education of the City of Lexington, etc. v. Moore, Ky. Law Rep., vol. 24, p. 1478; Commonwealth v. Carter, 21 Ky. Law Rep., 1509; Morgantown Bank v. Johnson, 22 Ky. Law Rep., 210; Marion County Fiscal Court v. Kelly, 22 Ky. Law Rep., 174, Kentucky Statutes, sec. 1749, subsecs. 1, 5; Throop on Public Officers, sec. 478, and authorities cited; Wortham v. Grayson County Court, 13 Bush, p. 53; Covington v. Maybury, 9 Bush, 304.

6. The duties of the county judge are prescribed by law, and it is not within the power of the fiscal court to appoint him to perform other duties, thereby taking him away from the discharge of the duties imposed upon him by law.

7 The appellant, Haskins, in accepting the office of county judge, assumed all the duties imposed upon that office by law; a part of the duties which he thus assumed was the duty, when directed by the fiscal court, to let out the working of the roads and the building and repairing bridges, and to take and approve the bonds of the contractors, and that being one of the duties of the county judge when imposed upon him, no compensation can be allowed him therefor.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

Appellant, H. M. Haskins, was elected county judge of Daviess county at the regular election in November, 1901, and at the January term, 1902, of the fiscal court, his salary was fixed at $1,000 per year. At its April term, 1903, the fiscal court made an order appointing him also county supervisor of the public roads and bridges of Daviess county, and fixed his salary as supervisor at the sum of $900 per year. Appellee, William Goodwin, a citizen and taxpayer of Daviess county, thereupon filed this suit to enjoin the treasurer from paying Haskins the $900 per year as supervisor, and, the circuit court having granted the relief prayed, the county judge appeals.

The ground of the judgment of the circuit court is that under the statute the county judge can not fill the office of

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road supervisor, and that the fiscal court is without authority to appoint the county judge to the office. It is earnestly insisted that the circuit court erred. By section 4306, Kentucky Statutes, 1899, the public roads shall be maintained either by taxation or by hands allotted to work thereon (or both), in the discretion of the fiscal court. By section 4312, in counties where the roads are worked by taxation, it is the duty of the overseer to report promptly to the supervisor all obstructions to travel, and to report to the county judge all failures of the contractors to comply with their contracts, and all violations or neglect of duty of the supervisor with regard to the road. By section 4313 the supervisor is to be appointed by the fiscal court, and in case of a vacancy in the office it is the duty of the county judge to fill it till the next regular term of the fiscal court. By section 4314 the supervisor must execute bond at the next regular term of the county court after his appointment, with sureties to be approved by it. By section 4315 it is the duty of the supervisor to report in writing to the county judge all failures of contractors to comply with their contracts. With the consent of the county judge, he may designate certain roads not to be let out, but kept in repair by special contact made privately, or by hands and teams hired by him or by delinquent taxpayers, or by persons sentenced to labor; "provided, however, that the fiscal court of any county wherein roads are worked by taxation may, instead of appointing a supervisor, authorize the county judge to so let out the working of the roads and the building or repairing of bridges and to take and approve the bonds hereinbefore required. In such cases the other power herein conferred and the duties imposed upon the supervisor shall be exercised and discharged by the road overseers in their

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respective precincts." By section 4317, for any violation of duty by the supervisor a warrant in the name of the Commonwealth may be issued by and returned before the county judge, and it is the duty of the judge to issue the warrant upon his own knowledge or upon information of another upon oath. By section 4318 the supervisor may, on the order of the county judge entered of record, hire wagons, scrapers, and teams, and procure forage for them, and either hire or purchase such tools and implements as may be necessary. By section 4335 penalties are provided for injury to the roads, tools, or implements, and it is the duty of the supervisor to report promptly to the county judge or some justice of the peace all violations of the act. By section 4338 no money shall be paid out, "except upon the order of the supervisor (specifying what for) with the indorsement thereon of the county judge of his approval or when no supervisor, upon order of the overseer or commissioner having charge so endorsed." By section 4339 the supervisor, upon the order of the county judge entered on the order book of his court, may let out by written contract the grading or cutting down of hills upon the public road, and give an order for the money, which order is to be indorsed "Approved" by the judge. These provisions do not contemplate that the supervisor and the county judge may be the same person. On the contrary, they contemplate that the county judge is to hold the supervisor to a strict responsibility, and that, to protect the interests of the county, there must be the concurrent judgment of both the county judge and the supervisor in important matters. It is true that under section 4315 the fiscal court, instead of appointing a supervisor, may authorize the county judge to let out the working of the roads; but in that event he acts as county judge, and not as supervisor, and is entitled to

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no additional compensation for his services, the other duties imposed upon the supervisor being in that event discharged by the road overseers in their respective precincts. If the county judge may act as supervisor, the purpose of the statute in providing for both a supervisor and a county judge to protect the interests of the county, would be entirely defeated. The fiscal court is a body of limited authority. It is without power under the statute to appoint the county judge as supervisor. Its action was therefore nugatory. The authorities relied on for appellant as to the acceptance of an incompatible office have no application, as the order of the fiscal court appointing the county judge as supervisor was void, and vested in him no right to the office.

The appellee, Goodwin, is a citizen and taxpayer of the county suing for himself and all other taxpayers, and may as such maintain the action to prevent a misappropriation of the county's funds, for, if the money of the county is wrongfully expended, taxes must be levied to supply its place in the treasury, and thus an additional burden will be cast on the taxpayer.

Judgment affirmed.

Petition for rehearing for appellant overruled.

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CASE 96—ACTION BY ISAAC GOODMAN'S ADMR. AGAINST L. & N. R. R. CO. FOR CAUSING DEATH OF PLAINTIFF'S INTESTATE.—DEC. 1.

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Goodman's Admr. v. Louisville & N. R. R. Co.

APPEAL FROM HART CIRCUIT COURT.

FROM A JUDGMENT DISMISSING THE ACTION, PLAINTIFF APPEALS. AFFIRMED.

RAILROADS—KILLING PERSON ON TRACK—NEGLIGENCE—EVIDENCE—SUFFICIENCY—LICENSE—TRESPASSER.

Held: 1. A railroad company owes no duty to trespassers on its tracks at places not frequented by the public by right or permission until their peril has been discovered.

2. In an action against a railroad company for the death of a child on its track in a cut seven or eight feet deep and about 230 yards from a crossing, evidence that it was possible for the engineer to have discovered the child when the train was at the crossing was insufficient to justify a finding that the engineer was negligent in not then discovering the child, where the brakeman testified that he was in the cab; that, after passing the crossing, he saw an object on the track about 150 yards ahead, which looked like a piece of paper, but that when the train had approached within thirty feet of the object he discovered that it was a child lying between the rails.

3. Where it was shown that a railroad track in a deep cut was fenced on both sides, and was inclosed by iron cattle guards at the crossings, evidence of the mere occasional passage of unauthorized pedestrians on the track there with the knowledge of the company was not sufficient to convert a trespasser there to a licensee.

McCANDLESS & JAMES, FOR APPELLANT.

SYNOPSIS OF BRIEF.

1. The peremptory instruction to find for the defendant, ought not to have been given. I. C. R. R. Co. v. Walters, 22 Ky. Law Rep., 137; Eskridge's Exr. v. R. R. Co., 89 Ky., 372; Fugate v. City of Somerset, 16 Ky. Law Rep., 807; Morris' Admr. v. L. & N. R. R. Co., 22 Ky. Law Rep., 1596; Dolfinger v. Fishback, 12 Bush, 474.

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(1.) Because the evidence was sufficient to justify the jury in finding that those in charge of the train saw the peril of the deceased in time to have prevented his injury, by the exercise of ordinary care. Shearman & Redfield on the Law of Neg., secs. 58, 59, 483; Becker v. L. & N. R. R. Co., 22 Ky. Law Rep., 1896; Meeks v. Sou. Pac. R. R. Co., 56 Cal., 513; East Tenn. R. R. Co. v. St. John, 5 Sneed, (Tenn.), 524; Keyser v. R. R. Co., 66 Mich., 390; Vanarsdall v. L. & N. R. R. Co., 23 Ky. Law Rep., 1666.

(2.) It was within the province of the jury to determine whether or not the deceased had sufficient discretion to be an actual trespasser, and if they should find that he did not have this discretion, the railroad company was liable, if by the exercise of proper care those in charge of the train could have seen the deceased in time to have prevented his injuries. C. N. O. & T. P. R. R. Co. v. Dickinson, 19 Ky. Law Rep., 1917; Ky. Cent. R. R. Co. v. Gastineau's Admr., 83 Ky., 125; McDermott v. R. R. Co., 93 Ky., 408; Conley's Admr. v. R. R. Co., 89 Ky., 402; East Tenn. Coal Co. v. Harshaw, 16 Ky. Law Rep., 526; Heilman v. Comwlth., 84 Ky., 457; vol. 7, (2d ed.), Am. & Eng. Ency. of Law, 405 and notes; Willet v. Com., 13 Bush, 230; South Cov. R. R. Co. v. Herrklotz, 20 Ky. Law Rep., 750.

2. The court refused to admit competent evidence offered by the plaintiff. L. & N. R. R. Co. v. Schmetzer, 94 Ky., 429; Roseberry's Admr. v. Railroad Co., 19 Ky. Law Rep., 194.

J. A. MITCHELL, E. W. HINES AND B. D. WARFIELD, FOR APPELLEE.

POINTS AND AUTHORITIES.

1. On the pleadings alone the judgment should be affirmed. Embry v. L. & N. R. R. Co., 18 Rep., 434.

2. The appellant's intestate was not of such tender years as to exempt him from the charge of contributory negligence. His capacity, or want of capacity, was an issuable fact, and was not raised in the pleadings. Pratt Coal & Iron Co. v. Brawley (83 Ala., 371), 2 Am. St. Rep., 751; Kenzer v. Pittsburg Ry. Co., 43 N. E., 649.

3. Duty of court to direct verdict because no proof showing want of capacity of deceased. Wendell v. N. Y. Cen. Ry. Co., 91 N. Y., 420; Tucker v. N. Y., etc. Ry. Co., 124 N. Y., 308; Nagle v. Alleghany Valley Ry. Co., (88 Pa. St., 35), 32 Am, Rep., 413; Shearman & Redfield on Neg., sec. 73a; C. C. C.

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& St. L. Ry. Co. v. Tartt, 64 Fed. Rep., 831; Kenzer v. Pittsburg, etc. Ry. Co., 43 N. E., 649.

4. There was no negligence on the part of those in charge of the train, and therefore, aside from the question of contributory negligence, there can be no recovery. 2 Shearman & Redfield on Neg., sec. 481a; Roseberry's Admr. v. N. N. & M. V. Ry. Co., 19 Rep., 194; L. & N. R. R. Co. v. Vittitoe's Admr., 19 Rep., 613.

5. The fact that the engineer or some other servant on the engine sees an object which on closer approach turns out to be a human being, does not impose the duty of stopping the train until it is discovered as such. L. & N. R. R. Co. v. Williams, 69 Miss., 631, (2 So. R. 957), Missouri Pac. Ry. Co v. Prewitt, 13 A. & E. Ry. Cas. (N. S.), 810; Chrystal v. Ry. Co., 11 N. E., 380 (N. Y.).

The case of Becker v. L. & N. R. R. Co., 22 Rep., 1893, does not contravene the doctrine of the Williams, Prewitt and Chrystal cases above cited. Compare also Vanarsdall v. L. & N. R. R. Co., 23 Rep., 1666.,

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—AFFIRMING.

The appellant, J. M. Craddock, as administrator of Isaac Goodman, deceased, brought this suit to recover damages for the death of his intestate. The petition alleges that "on the 27th day of August, 1901, the defendant, its agents and servants, negligently and carelessly ran one of its freight trains over the body of the said Isaac Goodman, inflicting upon him injuries which instantly resulted in his death." Defendant, the Louisville & Nashville Railroad Company, denied the alleged negligence, and in a second paragraph pleaded that the death of the plaintiff's intestate was the direct result of its own contributory negligence. The reply was a traverse of the plea of contributory negligence. The trial in the circuit court resulted in a peremptory instruction to find for the defendant and a judgment dismissing the action, from which this appeal is prosecuted.

It is complained that the trial court erred in the peremptory instruction, and also in rejecting competent evidence

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which was offered by the defendant. It appears from the bill of evidence that the decedent was run over and instantly killed by one of appellee's south-bound freight trains 2 miles north of Horse Cave station, and 230 yards south of a public road crossing, and about the same distance from a private crossing on the north, in a cut 7 or 8 feet deep. It is further shown that the deceased was an ordinarily intelligent boy, 11 years of age, and that he went upon the railroad right of way with a bag for the purpose of picking up pieces of coal which had fallen from the tender of passing engines, and that he had been in the habit of doing this, and had been cautioned, both by his father and older brother, about the danger of passing trains. Robert Wilkerson, a brakeman in the employ of the railroad company, was the only witness to the accident who testified. He was called by plaintiff, and testified that he was sitting in the cab of the engine on the opposite side from the engineer, and gave the usual signals of the approach of the train to the public crossing; that the train was traveling at between 32 and 35 miles an hour, and consisted of 28 loaded freight cars; that after he had passed the public road crossing he saw an object on the track about 150 yards ahead, which looked like a piece of paper, but that when the engine had approached within about 30 feet of the object he discovered the deceased lying on the track between the rails; that the engineer immediately applied the brakes, and stopped the train after it had run about two car lengths farther than the length of the train (or, in other words, that the body of the boy was about two car lengths behind the caboose); and that it could not have been stopped any sooner, or in time to have avoided running over the deceased after it was discovered that the object upon the track was the deceased. The plaintiff introduced testimony tending to show that it was possible for the deceased to have been discovered by the engineer at

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the public crossing, which was about 230 yards from the point where he was lying at the time he was killed, and it is contended that this was sufficient evidence to have justified the jury in believing that decedent was seen by the defendant's agents in charge of the train in time to have avoided the accident; or that, in any event, it was sufficient evidence to have authorized the submission of the case to the jury. In response to this contention it may be said that this court has repeatedly held that a railroad company owes no duty to trespassers upon its track at places not frequented by the public by right or permission, until their peril has been discovered. And we do not understand that this well-grounded rule was changed by the decision in Becker v. L. & N. R. R. Co. (110 Ky. 474; 22 R. 1893) 61 S. W. 997.

That case was decided upon the ground that the testimony was sufficient to have authorized the belief that defendant's agents saw the children upon the bridge in ample time to have avoided injuring them, but negligently failed to take the necessary steps to do so, under the belief that the children upon the bridge had time to have crossed over before the arrival of the train. The appellant also cites the case of the C., N. O. & T. P. R. R. Co. v. Dickerson's Adm'r (102 Ky., 560; 19 R. 1817) 44 S. W. 99, as authority for the contention that a higher degree of care is required for railroad companies where the trespassers upon their tracks are infants of tender years than where such trespassers are adults. In that case a little girl, two years of age, was playing upon the railroad track; and, while the engineer testified that he did not see her until he was within 20 feet of her, and too late to avoid the injury, he admitted that he saw the mother of the child running towards the track, waving her hands, her hair streaming in the air, apparently greatly excited. It also appeared that there was a straight track and nothing to obstruct the

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view for about 800 yards where the accident occurred. It was decided in that case that the motions and action of the infant's mother were sufficient to have apprised the engineer in charge of the train of the presence of some obstruction upon the track, and to have authorized the jury to believe that he actually became aware of the danger of the infant in time to have stopped the train before striking her. The facts in this case are not analogous to those in the Dickerson case. Here deceased was entirely familiar with the danger of going upon the track of the railroad. He had been sent there frequently upon the same mission as that he was on when killed. He was old enough to appreciate the danger of the situation, and his view was unobstructed in both directions. He would have had ample time to have gotten off the track if he had been using ordinary care after he might have discovered an approaching train. In broad daylight he laid down between the rails, and it certainly can not be said that it was negligence in the engineer in charge of the train not to have discovered his position of peril at the very first moment when it might have been discovered by one who went there for the express purpose of ascertaining whether such discovery was possible. Trains must be run on schedule time, and no duty is imposed upon those in charge to stop or slow up at the appearance upon the track of objects the nature of which is only discernible upon near approach. If the object seen by Robert Wilkerson has been at a highway crossing, or in the street of a town or city, where the presence of small children might be suspected, a different case would be presented, and a different standard of diligence could have been required. Appellee's engineer had no more reason to suppose an infant would be upon its track at the point where the accident in this case occurred than an adult, and owed no higher degree of diligence to him than to an adult. See Paducah & Memphis R. R. Co. v. Hoehl

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75 Ky. 49; L. & N. R. R. Co. v. Hunt (11 R. 825) 13 S. W. 275; L. & N. R. R. Co. v. Webb (99 Ky. 332) 18 R., 258, 35 S. W. 1117; McDermott v. K. C. Ry. Co., 93 Ky. 408, 14 R. 437; 20 S. W. 380; 2 Shearman & Redfield on Neg. sec. 481a; Roseberry's Adm'r v. N. N. & M. V. R. R. Co. (19 R., 194) 39 S. W., 407.

It is also complained that the trial court erred in refusing to permit the plaintiff to prove that the railroad at the point where deceased was killed had been, with the knowledge of the company, used as a footway by pedestrians for many years, and that for this reason deceased could not be regarded as a trespasser. The testimony shows that the railroad is fenced on both sides, and is enclosed by iron cattle guards at the two crossings. Besides, the point where the accident occurred was in a deep cut. There was no claim that the company had ever authorized the use of their roadbed at this point as a footway, and the mere occasional passage of unauthorized pedestrians at this point with the knowledge of the company was not sufficient to convert a trespasser into a licensee, or to change the degree of care due by the railroad company. Upon the whole case we have reached the conclusion that there was no evidence of negligence on the part of those in charge of the train, and that the trial court did not err in its peremptory instruction,

Judgment affirmed.

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CASE 97—INDICTMENT AGAINST THE SOUTHERN RAILWAY IN KENTUCKY FOR DISCRIMINATION IN FREIGHT RATES.—DEC. 1.

Southern Railway in Ky. v. Commonwealth.

APPEAL FROM MERCER CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

RAILROADS—FREIGHT RATES—DISCRIMINATION—THROUGH SHIPMENT.

Held: 1. Const., section 215, providing that all railway companies shall transport freight of the same class for all persons from and to the same points and upon the same conditions, in the same manner, and for the same charges, does not prohibit a railway company from charging a through rate which is less than the sum of the local rates between the two points.

2. A railroad company issued a bill of lading agreeing to transport freight to a point which was several miles from the nearest station on its line. At this station a person who had always made it a practice to carry freight between the station and the point to which the goods in question were consigned took charge of the goods, and carried them to the consignee, with whom he had a special contract as to the price to be charged for carrying such goods. Deducting this price from the through rate charged by the company, the remainder was less than the local rate from the point of shipment to the station. Const., section 215, provides that all railways shall transport freight of the same class from and to the same points for the same charges. HELD that, notwithstanding the railroad company had no express contract with the person who carried the goods from the railroad station to their destination, nevertheless it was a through shipment, for which the railroad company was entitled to charge a sum less than the sum of the local rates.

HUMPHREY, BURNETT & HUMPHREY, ATTORNEYS FOR APPELLANT.

POINTS AND AUTHORITIES.

1. A through rate which is less than the sum of the local rates between the point of shipment and the point of destination, does not constitute a discrimination under section 215, of the Constitution of Kentucky.

2. Delivery of shipment consigned to Perryville, to a wagon

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line at Harrodsburg, was not a delivery to the consignee at Harrodsburg.

3. An unjust discrimination must be knowingly or willfully made in order to constitute an offense under the law.

AUTHORITIES CITED.

Supplement to Revised Statutes of the U. S., 2d. ed., 1874-1891, vol. 1, pp. 529-533; Tozer v. United States, 52 Fed. Rep., 918; Parsons v. Chicago & N. W. R. R. Co., 63 Fed. Rep., 909; Illinois Central R. R. Co. v. People, 121 Ill., 304 (12 N. E., 674); Interstate Commerce Commission v. B. & O. R. R., 145 U. S., 276; Louisville & Nashville R. R. v. Commonwealth, 22 Ky. Law Rep., 335-6; Parsons v. Chicago & N. W. Ry. Co., 167 U. S., 447; Southern Pacific Ry. Co. v. Haas, 85 Tex., 401 (17 S. W., 601); Texas Pacific Ry. v. Interstate Commerce Commission, 162 U. S., 197; Robertson & Co. v. Kennedy, 2 Dana, 431; Caye v. Pool's Assignee, 21 Ky. Law Rep., 1600 (55 S. W., 877); Dibble v. Brown, 12 Ga., 217 (56 Am. Dec., 460); Parmelee v. Lowitz, 74 Ill., 116 (24 Am. Rep., 276); Chevallier v. Strahan, 2 Tex., 115 (42 Am. Dec., 639); Potter v. United States, 155 U. S., 445; Spurr v. United States, 174 U. S., 735; State *ex rel.* Hickman v. Alcorn, 78 Tex., 387 (14 S. W., 663); State v. King, 86 N. C., 603; Mullins v. State, 37 Tex., 338.

HAZELRIGG & CHENAULT, AND J. S. OWSLEY, JR., FOR APPELLEE.

SUPPLEMENTAL BRIEF.

(Original brief not in the record.)

The cases relied on by appellant only show this: That a through joint rate may be agreed upon by common carriers, which is less in amount, than the local rates charged by the same carriers.

When examined it will be found that these same cases hold that it takes an agreement or contract on the part of the carriers with each other, in order to get the benefit of this principle.

The case for the railway therefore, rests upon the assertion that there was a contract, express or implied, between the Southern Railway Company and Irwin, the mail carrier, by which a joint through rate was agreed on for shipments from Louisville to Perryville.

It is argued by appellant that such an agreement or arrangement may be inferred from the course of the business in past

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years, and from an old contract made with James in 1889. We may admit that such an inference may be drawn, and we may admit further that had this court been in the shoes of the court below or the jury, the inference of a contract might have been given force, but as overcoming the inference of such a contract we have the direct testimony of Irwin that no such arrangement or contract had ever been made or that he had any notice that he was being treated as a contracting party with the railroad company.

Suppose we give to the defendant therefore, the benefit of all the law he contends for, and try the case as if before a jury; the jury would have been instructed as follows:

"If the jury believe from the evidence that the shipment of the gasoline in question was made under a contract, express or implied, by and between the railway and Irwin, by which a joint rate was established of twenty-one cents for the railway and fifteen cents for the wagon line then they will find the defendant not guilty."

We maintain that the court acting in place of the jury found as a matter of fact, that there was no contract, express or implied, for this shipment at the rate of twenty-one cents and fifteen cents, and this finding of fact is conclusive of the case.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

The grand jury of Mercer county returned an indictment on February 6, 1902, charging that appellant within 12 months before the finding of the indictment, transported a barrel of gasoline for Henry E. Samuels from Louisville to Harrodsburg, Ky., for the price of 26 cents per 100 pounds and contemporaneously therewith transported between the same points a barrel of gasoline of the same class and kind of freight for Wallace Green for the price of 21 cents per 100 pounds; that this was done willfully and knowingly, with intent to discriminate in favor of Green and against Samuels, in violation of section 215 of the Constitution of Kentucky: "All railway, transfer, belt lines, or railway bridge companies shall receive, load, unload, transport, haul, deliver, and handle freight of the same class for all persons, associations, or corporations, from and to the same points

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and upon the same conditions, in the same manner and for the same charges, and for the same method of payment." Section 217 of the Constitution, which fixes the penalty for a violation of section 215, is as follows: "Any person, association, or corporation, willfully or knowingly violating any of the provisions of sections two hundred and thirteen, two hundred and fourteen, two hundred and fifteen, or two hundred and sixteen, shall, upon conviction by a court of competent jurisdiction, for the first offense be fined two thousand dollars; for the second offense, five thousand dollars, and for the third offense shall thereupon, ipso facto, forfeit its franchises, privileges or charter rights; and if such delinquent be a foreign corporation, it shall, ipso facto, forfeit its rights to do business in this state; and the Attorney General of the Commonwealth shall forthwith, upon notice of the violation of any of said provisions, institute proceedings to enforce the provisions of the aforesaid sections." The proof on the trial showed that Samuels lived at Harrodsburg, a point on appellant's line of railroad, but that Green lived at Perryville, which was 10 miles away from appellant's road. Twenty-six cents per 100 pounds were charged Samuels for the barrel of gasoline shipped to him, which was billed to him at Harrodsburg. The barrel of gasoline shipped to Green was billed to him at Perryville, and was shipped at the rate of 36 cents per 100 pounds from Louisville to Perryville. When the gasoline reached Harrodsburg, it was delivered to a man named Erwin, who ran a wagon daily from Harrodsburg through Perryville to Mitchellsburg, carrying the United States mail; also persons and property. He took the gasoline to Green, collecting the charges going to the railroad, which were 21 cents per 100 pounds, and paid the amount to the company. Green paid Erwin 50 cents for bringing the barrel over, which was 10

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cents less than was coming to Erwin on the basis of 15 cents per 100 pounds.

There was an arrangement between Green and Erwin that Erwin would haul gasoline over at 50 cents a barrel. This arrangement seems to have grown out of the fact that there is a station on the Louisville & Nashville Railroad four miles from Perryville, from which also goods were hauled to Perryville, and Erwin was underbidding to get the hauling on his route. The railroad had for a number of years a published tariff on this class of goods by which the rate was fixed to Harrodsburg at 26 cents and to Perryville at 36 cents. When the rate was first made, about the year 1889, a man named James was running the wagon line, and the rate of 15 cents for the wagon line was then agreed on between him and the the railroad company. After three years he sold out to a man named Tatum, and subsequently Erwin came in under Tatum; but the railroad company had no agreement with Erwin. It simply billed the goods to Perryville as before. Erwin received them at Harrodsburg and delivered them at Perryville. The railroad company did not know that Erwin was making any reduction on the 15 cents per 100 pounds allowed for his part of the haul. The goods were not delivered to the consignees at Harrodsburg, but were required to be carried over by the wagon line and delivered at Perryville. The wagon line hauled for everybody that applied, and also carried for a time the express matter, each owner as he came in succeeding to all the rights and privileges of his predecessors. The proof leaves no doubt that the operator of the wagon line was a common carrier. Robertson v. Kennedy, 2 Dana 431, 26 Am. Dec. 426; Caye v. Pool (108 Ky. 124; 21 R. 1600) 55 S. W. 887, 49 L. R. A. 251; Chevallier v. Straham, 47 Am. Dec. 639.

If there had been a railroad operated by another company

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running from Harrodsburg through Perryville to Mitchellsburg, and the barrel of gasoline had been taken by appellant to Harrodsburg, and by the other company to Perryville, appellant receiving 21 cents per 100 pounds for carrying it, and the other company 12½ cents, it could not be maintained that this would have been a violation of section 215 of the Constitution; for it is well settled that a through rate can be made less than the sum of the local rates between the two points. Were it otherwise, all through freight would have to be hauled at the local rates. Railroad Company v. Osborne, 52 Fed. 912, 3 C. C. A. 347; Tozer v. U. S. (C. C.) 52 Fed. 918; Interstate Commerce Commission v. B. & O. R. R., 145 U. S. 276, 12 Sup. Ct. 844, 36 L. Ed. 699; Parsons v. Chicago, etc. R. R. Co., 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231.

The fact that the connecting carrier took the goods on a vehicle pulled by horses and not by steam, is not relied on as changing the principle; but it is urged that Erwin had no contract with the railroad company, and that therefore, he took the goods simply as the agent of the consignee, Green. Without considering whether a contract should be implied from the fact that he came in under James, who made the contract with the railroad company, we rest our judgment on the ground that appellant had received the goods consigned to Perryville, and had, by its bill of lading agreed for 36 cents per 100 pounds to transport them to Perryville. This was not a shipment to Harrodsburg. There was in such a shipment and the shipment to Samuels at Harrodsburg no discrimination between shippers of the same class of freight between the same points. Appellant had the right to charge less for part of the through haul than the local rate to that point. When it received the goods and undertook to carry them to Perryville, it was its duty to see that they got to Perryville. Its obligations under such a contract were different from those

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under a contract to carry goods to Harrodsburg. It was a through shipment from Louisville to Perryville. Erwin came in under it, and whether there was any contract, express or implied, between it and Erwin, there was an express contract between it and the shipper that it would transport the goods from Louisville to Perryville. We are therefore of opinion that the facts shown establish no violation of the constitutional provision quoted. If there was anything in the evidence indicating an evasion of the constitutional provision by the billing of the goods to Perryville and the delivery of them at Harrodsburg to the consignee in order to discriminate between shippers, a different question would be presented. But the facts show perfect good faith, and also show that only in this way can appellant carry goods to Perryville.

Judgment reversed and cause remanded, with directions to dismiss the indictment.

CASE 98—ACTION BY SARAH M. ROBERTSON AGAINST THE DAVIESS GRAVEL ROAD COMPANY FOR INJURY TO HER LAND BY CAUSING SURFACE WATER TO ACCUMULATE THEREON.—DEC. 2.

Robertson v. Daviess Gravel Road Co.

APPEAL FROM DAVIESS CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

SURFACE WATER—RIGHTS OF DOMINANT OWNERS—ACQUISITION OF EASEMENT—EXTENT.

Held: 1. The right of the owner of property naturally draining on a road to have the surface water flow over the road extends no further than to burden the road with the natural flow of surface water, and does not entitle such owner to collect the water from his and other lands into a ditch, and discharge

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it on the road at a certain point, and compel the proprietor of the road to there receive it and provide for its disposal.

2. In an action against the proprietor of a road for allowing a ditch which had carried off surface water from plaintiff's ditch to become filled up, a complaint stating that the county, prior to defendant's acquisition of the road, had kept the ditch clean, but which did not state that it had continued such custom for a sufficient length of time to constitute an easement, nor that defendant or the county had for any length of time suffered the water from plaintiff's ditch to run over the road, shows an easement, if at all, merely to use the ditch alongside defendant's road to receive the water from plaintiff's ditch, and not an easement to have the ditch kept open by defendant.

ELI H. BROWN, ATTORNEY FOR APPELLANT.

Appellant claims that she, having constructed a ditch through her land to the county road which drained her land through a ditch which had been constructed and maintained by Daviess county along said public road for more than fifteen years, that the appellant, Daviess Gravel Road Company had no right to fill up the ditch on the public road, and thereby prevent and obstruct the flow of the water from her land through her ditch into and through the ditch along the public highway which had been maintained by the county for more than fifteen years.,

AUTHORITIES CITED.

Kemper & Wife v. City of Louisville, 14 Bush, 89; Stith v. L. & N. R. R. Co., 22 R., 653.

SWEENEY, ELLIS & SWEENEY, FOR APPELLEE.

The following propositions are self-evident when viewed in the light of the plaintiff's original petition.

1. It is not averred that the grade of the public road complained of, was established within fifteen years before the institution of this action; the court will therefore conclude most strongly against the pleader, that it was established more than fifteen years before the institution of this suit, and if it was, plaintiff has not manifested a cause of action.

2. The allegation of the petition, that on account of the grade of the road the water thus artificially collected by appellant in her ditch was not permitted to flow over the road,

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is not good, because it is not averred that she or her ancestors at any time ever enjoyed such right.

3. We insist that under the pleadings including the two amended petitions, if appellant was collecting the surface water upon her own land and that of her neighbor, and throwing it upon the lower proprietor, that lower proprietor had the right to dam it up and prevent its flow across its premises, though such premises may have been no more than a public highway.

AUTHORITIES CITED.

Kemper v. City of Louisville, 14 Bush, 89; Keasey v. Louisville, 4 Dana, 554; 29 Am. & Eng. Ency., 1st ed., 325; Wolf v. Covington R. R. Co., 15 B. M., 408; Louisville Ry. Co. v. Round, 17 B. M., 777; Hahn v. Thornsberry, 7 Bush, 403; Gould on Waters, secs. 267, 268; Barkley v. Wilcox, 40 Am. Rep., 519; Grinstead v. Sanders, 22 Ky. Law Rep., 51.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

Appellant is the owner of a tract of land lying adjacent to appellee's gravel road near Owensboro. The land in that immediate neighborhood is low, and nearly level, but it lays so that its surface drainage is naturally toward the gravel road. More than 15 years before this suit her land and other lands lying back of it were drained by a ditch through her land, which emptied into another ditch running alongside the road. She alleges that before appellee acquired the road, and while it was operated as a public highway by Daviess county, the county kept the latter ditch open so as to accommodate the water drawn off by her ditch. Her complaint then continues: "Plaintiff states that defendant has reconstructed said road in front of her land, and has raised the roadbed to a higher grade than the grade which was maintained and existed while the same was in control of Daviess county as a public road, so as to render it impossible for the water falling on her and the Hathaway lands and flowing into her ditch above mentioned to drain over said road

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as reconstructed by defendant, and so as to cut off all escape for the water thus accumulating in her said ditch, except as the defendant might have opened and kept open at all times a sufficient ditch running parallel with its said reconstructed road of sufficient width and depth to have carried off said water. This the defendant could have done. . . . That within the last five years the defendant has failed and refused to construct, keep, or maintain along or across its said road in front of her land any drainage sufficient to carry off and discharge the accumulations of water in her ditch above mentioned, which flows to and against defendant's said road, but, instead of doing this, as it was its duty to do, it wrongfully, unlawfully and against plaintiff's protest suffered and permitted such inadequate drainage as exists along its roadway to become filled up and so obstructed as to cause the water flowing in time of rains from her own and said Hathaway land to overflow her ditch above mentioned, and to back up so as to overflow her house, yard," etc. A demurrer was sustained to appellant's petition, and it was dismissed.

Although appellant was entitled to have the natural drainage of the surface water from her land and the lands lying back and above it to flow off and over appellee's land, as was held by this court in Stith v. L. & N. R. R. Co., 109 Ky. 174; 22 R. 653; 58 S. W. 600, this right did not extend further than to burden the lower estate with the surface water of the upper as nature had done it. Appellant's contention is that she has the right to collect not only the surface water from her own land, but that from adjacent land which would otherwise flow over hers, into an artificial channel, and then to thereby carry it in its accumulated quantity and accelerated force and cast it all upon the lower land of appellee at one point, requiring appellee to there receive it, and to provide for its subsequent disposal so that it would not damage her property.

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The only authority cited in support of the proposition is Stith's case, supra, which does not at all warrant the deduction. This case is much nearer like Grinstead v. Sanders (22 R. 51) 56 S. W. 665, where the right was denied. But appellant claims that she had so maintained and used her ditch for 15 years, and that by such user she had acquired the right to so gather and precipitate all the surface water from her land at the point named. Though this be so, it does not follow that the owner of the lower estate was bound to keep open a ditch to receive the water, even if he had done so for a period.

The gravamen of the complaint is not that appellee has raised its roadbed, but that it has suffered a ditch alongside its road to fill up so that it will not accommodate the the flow from appellant's ditch in rainy seasons Although it is alleged that the county, prior to appellee's acquisition of the road, did keep the ditch clean, it is not charged that this was done for such length of time as would constitute an easement in favor of appellant's estate. Nor is it charged that appellee or the county had suffered the water from appellant's ditch to run over the road for any length of time. If any easement whatever has been acquired by appellant over appellee's property under the facts stated in her petition, it is merely to use the ditch alongside its road to receive the water from her ditch. If one acquires the right to use a passway over another's land, the owner of this right must repair the way, in the absence of contract to the contrary.

That which the owner of the dominant estate acquires is the right to use the servient estate for a designated purpose appurtenant to the dominant. The owner of the servient estate can not interfere with the enjoyment of the right. But this right applies only to the realty, and not to the personal service of the owner of the servient estate. If appellant has

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acquired the right by prescription to use the ditch alongside appellee's road, to that extent, and as an appurtenant to her land, it is her ditch, and she may clean it when necessary for its proper enjoyment. It is not claimed that she has been denied this right.

Wherefore the judgment must be affirmed.

CASE 99—ACTION BY B. W. TUCKER AND OTHERS AGAINST WAYNE HOGAN, TO RESCIND A CONTRACT FOR THE SALE OF A FLOUR MILL. —DEC. 2.

Hogan, &c. v. Tucker, &c.

APPEAL FROM TAYLOR CIRCUIT COURT.

JUDGMENT FOR PLAINTIFFS AND DEFENDANTS APPEAL. REVERSED.

SALES—WARRANTY OF QUALITY—BREACH OF WARRANTY—RESCISSION —TIME—RELIEF—PECUNIARY COMPENSATION.

Held: 1. In an action by the purchasers of a mill against the sellers on the ground of fraud in representations as to the condition of the mill, it appeared that plaintiffs discovered the fraud very shortly after they took possession, but that they continued to use the property, and accepted a written promise from one of the sellers to repair the boiler and engine, or furnish new ones; that the repairs were attempted to be made, but were ineffectual; and that the engine was changed for another, and other minor changes made in the mill, after which plaintiffs continued to run it for about six months, defendants in the meantime having disposed of the property which they had received for the mill at a price $650 less than they had allowed plaintiffs for the same. HELD, that it was error to allow a rescission of the contract, but that plaintiffs should have been awarded pecuniary compensation.

DENTON & ROBINSON, ATTORNEYS FOR APPELLANTS.

We take the ground:

1. That where a vendee seeks a rescission of a contract for

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the sale of real estate in order to comply with the doctrine requiring the parties to be placed in *statu quo*, a properly executed and acknowledged deed should be tendered to the vender with the petition. An allegation that the plaintiff is willing and able to reconvey is insufficient.

2. The rule is, the party must make his election either to rescind the contract by restoring all that he obtained by it, in which event he may recover of the defendant what he has paid on it; or he may retain the property and sue for damages. In this case the plaintiff, by bringing the suit for rescission, chose the former method, and in seeking equity, he must do equity by returning the title unimpaired to the defendants.

3. The judgment which directs that the defendant, Wayne Hogan, be restored to immediate possession of the property and the keys directed to be delivered to him, that the notes for the purchase price of the mill and lot be cancelled, and that plaintiffs recover the full sum of $1,900 and costs of Hogan, does not place the parties in the same position they were in before the deal.

4. We insist that the doctrine of caveat emptor must apply in this case, and that appellees having seen the property they purchased, and made such inspection as they desired, and had ample opportunity to do so before purchasing, they must look for themselves and rely on their own judgment and can not complain.

5. Appellees must have tendered back the property as soon as they discovered the alleged defects, and failing to do this, but keeping and using it for nine months, they can not recover.

6. The parties having agreed in writing to keep the mill and let the contract stand, they waived their right to rescind, and their only cause of action, if any, is for a breach of contract.

7. Representations made by Hogan in making the sale merely praising and recommending the property, can not be regarded as warrantees.

LIST OF AUTHORITIES CITED.

Ency. Plead. & Prac., vol. 18, pp. 829, 831, 837, 838; Hail v. Cave, 3d B. Mon., 159; Humble's Heirs v. Hainkson's Heirs, 3 Marshall, 468, 4 Dana, 284; Buford v. Brown, 6 B. Mon., 553; Williams, etc. v. Carter, 3 Dana, 198; Kentucky Statutes, secs. 490, 495, 501, 505, 2134, 470; Brown v. Witter, 10 Ohio, 142; Hammond v. Wallace, 85 California, 531; Bernard v. Kellogg, U. S. Supreme Court Reports, vol. 19, Law Edition, pp. 987, 989; Adkins v. Blake's Admr., 3 J. J.

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Marshall, 40; Lightburn v. Cooper, 1 Dana, 274; Marshall v. Peck, 1 Dana, 609; Newton v. Long, 13 Ky. Law Rep., 698; Crawford v. Duncan, 6 Ky. Law Rep., 749; Stewart v. Daugherty, 3 Dana, 380; James Bros. v. McEwin, 91 Ky., 377, 12 R., 966; Brooke v. Duckwall, 23 Ky. Law Rep., 1459, 1460; Peak v. Gore, 94 Ky., 534; Lyon v. Osborne, 7 Ky. Law Rep., 305; Bailey, etc. v. Nichols, Sheppard & Co., 8 Ky. Law Rep., 64; Spaulding v. Tucker, 21 Ky., Law Rep., 223; Dent v. Murphy, 13 Ky. Law Rep., 46; Clark v. Smith, 10 Ky. Law Rep., 196.

WOOD & RICE AND S. A. RUSSELL, ATTORNEYS FOR APPELLEES.

The determination of two questions settles this case.

1. Did Hogan, in making the sale, represent the mill to be as good as new? If so, was it as good as new, and do as good work as new?

2. When appellees took possession thereof, was the mill defective and not capable of doing good work? If so did Hogan repair it and make it good as new and do as good work as if new?

Ancillary to the vital questions are the following:

(a) Did appellees know, or by the use of ordinary prudence could have known the condition of the mill before and at the time they bought it?

(b) Did appellees in the purchase of the mill rely upon the representations and guarantee of Hogan, and did such representations and guarantee induce the purchase of the mill?

(c) Have appellees done or omitted to do any act that, in justice, should relieve Hogan of the covenant of his guarantee?

3. The proof shows that the defects in the mill, were latent, covered up with grease, dust, flour and meal, and could only be discovered by actual operation of the mill, not merely by seeing it in motion.

4. A person knowingly selling property with material latent defects, without disclosing same to buyer, is guilty of fraud entitling the buyer to avoid the sale.

Hogan made a false representation that the mill was as good as new, and so guaranteed it. He intended appellees to rely on same. Appellees did in fact so rely, and having so relied, it is immaterial whether or not appellees had information, or the means of such.

5. Caveat emptor applies to implied warranties, not to expressed warranties. Here the warranty was positive and emphatic.

6. As to injury alleged to have been done by appellees in re-

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pairing the mill, we insist (1) that the claim is imaginary, (2) not supported by the evidence, (3) were directed by Hogan's agent, (4) that the charge so made are the acts of Hogan, and he can not complain of the consequences, and (5) that what appellees did to the mill was beneficial.

7. Even if the rule required a tender of deed by appellees with their petition, this was waived by appellant's failure to demur to the petition and was cured by appellant's pleadings and the judgment.

The judgment of the chancellor should be affirmed.

LIST OF AUTHORITIES CITED.

Lawson's Rights, Remedies and Practice, vol. 5, sec. 2373, p. 3956, 57 Am. Dec., 720; Lawson's Rights, Remedies and Practice, p. 3942, sec. 2363, 43 Am. Dec., 651; Lawson's Rights, Remedies and Practice, p. 3933, secs. 2347-8; 72 Am. Dec., 563; 13 Am. Dec., 265; 15 Am. Dec., 105; Lawson's Rights, Remedies and Practice, p. 3938, sec. 2355; Debell v. Stephens, 3 Barn., 623; Lawson's Rights, Remedies and Practice, vol. 5, p. 3952, sec. 2370; Lawson's Rights, Remedies and Practice, vol. 5, pp. 3978-9, secs. 2386-7; 2 Am. Dec., 113; Civil Code, sec. 27; Breckinridge v. Moon, 3 B. M., 635; Mells v. Lee, 6 Mon., 99; Perkins v. Rice, Litt. Select Cases, 219; Upshaw v. Debow, 7 Bush, 447; Ruffner v. Ridley, 81 Ky., 165 (4 R., 958); Prewitt v. Trumble, 92 Ky., 176 (13 R., 581); Hanks v. McKee, 2 Lit., 228; Grant v. Shelton, 3 B. M., 423; Robertson v. Clarkson, 9 B. M., 507; Hughes v. Robertson, 1 Mon., 216; Peak v. Gore, 94 Ky., 536.

OPINION OF THE COURT BY JUDGE NUNN—REVERSING.

It appears that appellants, Wayne Hogan and J. P. Gaddie, were the owners of a flour mill, and site, in the town of Wickliffe, Ballard county, Ky.; that they sold this property to appellees on or about the 8th day of April, 1901, for the sum of $6,300. Appellees, by their contract, agreed to pay $2,300 in cash, or its equivalent, and executed their four notes, of $1,000 each, due in one, two, three and four years. Appellants made and executed a deed to appellees for this property on the terms stated, and delivered same to appellees on the 15th day of April, 1901, and agreed to, and did,

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accept from appellees, in lieu of the cash payment of $2,300, a small tract of land, at the price of $700, and a traction engine, a boiler, a saw rig, and threshing machine at the price of $1,200. For the balance of the $2,300, to wit, $400, the appellants accepted appellee's note. Appellees took possession of the mill at Wickliffe, and commenced to operate it, and found the mill in bad condition—the boiler and engine almost worthless, and the sifters and bran dusters worn and in bad condition. Within a few weeks they notified Wayne Hogan of the condition of the mill, and he promised to repair it. Nothing was done in the way of repairs until the 10th day of August, 1901, when Wayne Hogan, one of the appellants, made and executed the following writing: "This is to show that I will, and do hereby and herein promise and agree, immediately to repair and make good as new the engine and boiler of the mill sold to B. W. Tucker & Son, this year, in Ballard county, Kentucky, and when repaired and fully tested by said Tucker & Hogan, if said boiler or engine fail to do as good work as if they were new, then in that event I will at once purchase new ones and put in the said mill instead of the old ones and do this at my own expense and cost. This August 10th, 1901. [Signed] W. Hogan. Appellant Hogan sent George Stephenson, a millwright, from Taylor county to Ballard, to repair the engine and boiler. Stephenson arrived there about the 15th of August, 1901, and worked on the boiler about 13 days, but did not succeed in making it a good one. He found the engine in such bad condition that he did not attempt to repair it. G. W. Tucker, after consultation with Stephenson, exchanged the engines for another one, and changed the position of the boiler, and made other changes of minor consequence; and in this condition appellees attempted to run the mill until about the 1st of March, 1902, when

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they abandoned or ceased to operate it, and tendered it to appellants, and demanded the return of the amount they had paid on the mill. Appellants refused to rescind. Appellees on the 13th day of March, 1902, brought this action in the Taylor circuit court. In their petition they made two paragraphs: (1) They alleged fraud on the part of appellants, and made the necessary allegations with reference thereto; (2) they alleged that appellants warranted the mill in all particulars to be as good as new, and that it was worthless, and that they had been damaged in the sum of $4,000, and other sums. In their prayer they asked for a rescission, and, if that could not be had, then a judgment for damages upon the warranty. The court on motion of appellants, compelled appellees to elect which paragraph they would prosecute—the first, for rescission on the grounds of fraud, or on the warranty—and appellees elected to prosecute the action under the first paragraph. The case was prepared and tried, and the lower court adjudged that the contract be rescinded, and that appellees recover of the appellants the sum of $1,900, with interest from the date of the trade, to-wit, 8th of April, 1901.

Appellants complain of this judgment, and say that they did not deceive, or commit any fraud upon, appellees, in making the sale of this property to them, but, if they did, the appellees failed to ask for a rescission within a reasonable time after the discovery of the fraud, and that appellees had used the property for 10 or 11 months, had exchanged the engine for another, had changed the situation of the boiler and had made other minor changes in the property; that, before the appellees asked for a rescission, they (appellants) had sold the land and machinery which they had received in part pay for a much less sum than they had allowed appellees in the trade, to wit, the land at $650, for which they had allowed

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appellees $700, and the machinery at $600, for which they had allowed appellees $1,200.

We are of the opinion, from the facts as shown by the record, that appellees were deceived in the trade, and that they were and are entitled to relief. It is shown that appellants represented the mill and machinery to be all right in every respect, and as good as new, and that at the time the engine and boiler and other minor parts were damaged and almost worthless. J. P. Gaddie must have known these facts, as he was at the mill and in charge at the time the damage occurred. But it is not made clear that Hogan, the partner, and the other appellant, on whose statement appellees alleged they relied, was acquainted with the injured condition of the mill, as he resides in Taylor county, and did not visit the mill often. But in view of all the facts and circumstances proven, this court would not feel inclined to disturb the finding of the lower court in rescinding the trade on the ground of fraud and deception practiced by appellants, provided the rescission would have placed the parties in statu quo, or nearly so.

The question then to be determined is did appellants elect to rescind within a reasonable time after the discovery of the fraud practiced upon them? If so the judgment should be affirmed; otherwise reversed. In the case of Hoggins v. Becraft, 1 Dana, 31, the court said: "The law has not defined reasonable time." It can not be defined by any prescribed rule. What is reasonable in one case may be unreasonable in another case. What is reasonable in any case must be ascertained by the application of reason to the facts which characterize the particular case. Delay for one week after full discovery may be unreasonable in some cases. A much longer delay may in other cases be reasonable. The injured party should observe ordinary vigilance and good faith. He

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should not, by culpable negligence or by design, subject the other party to unnecessary inconvenience, loss, or hazard; and, whenever he offers to return the property, it should be in as good condition as it was when he might have first returned it after full discovery of its defectiveness so as to place both parties as near as possible in statu quo. All this may appear in a supposable or possible case, even though months may have elapsed. It may not appear in another possible case in which one week had evolved. Time, in the abstract, is not essential. It is material so far only as, when associated with other circumstances, it may produce injurious or unjust consequences. The great object of the rule of law on this subject is to prevent injury or wrong to the vendor; and the main question in every such case should be, has he any just cause to object to the rescission of the contract; has he been trifled with; will he have suffered by unnecessary and improper delay?" In the case of Colyer v. Thompson & Johnson, 2 T. B. Mon. 18, the court said: "Nor will a court of equity in every case set aside a contract on the ground of fraud. Where the injured party, within a reasonable time after he has discovered the fraud, makes his election to disaffirm the contract, and offers to restore the property, a court of equity will, at his instance, interpose and set it aside. But if, after discovering the fraud, he still retains the property, and uses it as his own, and makes no offer to restore it, or does not otherwise evince a determination to avoid the contract, a court of equity will not set it aside." And in such case he must get relief in damages. The case of Ruffner, etc., v. Ridley, etc., 81 Ky. 169, 4 R., 958, was where a party sought relief from a contract obtained by fraud, and the court said: "A court of equity will rescind if the circumstances are such that the parties can be put in the condition they were in at the time of the execution of the contract, but,

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if these elements do not concur, the chancellor will decree compensation if the fraud is proved, and a substantial injury has resulted therefrom. Whenever there is fraud, with a resulting injury of a substantial character, a court of equity will give relief, either by rescission or pecuniary compensation." In the case of Bernard Leas Mfg. Co. v. Waller (18 R., 346) 36 S. W. 531, the court said: "He might have, within a reasonable time after discovering the breach of warranty or worthlessness of the machine, offered to return the machine, and, if his cause of action was well founded, he would have been relieved from any liability for the price or value of the same, and might have had such other relief as he showed himself entitled to; but, not having done so, the judgment, etc., should not be allowed to stand." In 1 Bigelow on the Law of Fraud (Ed. 1888) 436, the author says: "The defrauded party to a contract has but one election to rescind the same. If he once determine his election, it is determined forever. Hence if it be shown that he has at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, his election is irrevocable. Nor has the injured party power to keep the question of election open so long as he will. The rule of law upon this point is this: So long as the defrauded person has made no election, he retains the right to determine it either way, provided that, in the interval while he is deliberating, an innocent third party has not acquired an interest in the property, or that in consequence of his delay the position of the wrongdoer himself has not been substantially affected."

The appellees prove that they discovered the fraud in a few days after May 1, 1901; they kept and used the property; accepted a written promise from appellant Hogan to repair boiler and engine, or furnish new ones; the repairs

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were attempted to be made, the engine was exchanged for another, and other changes made in the mill; and then appellees continued to run the mill until about the 1st of March, 1902. In the meantime, appellants disposed of the property which they took from appellees at the price of $650 less than they had allowed appellees for same. Under these circumstances, the court should not have rescinded the contract, but should have granted appellees relief by giving them pecuniary compensation.

The judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

CASE 100—INDICTMENT AGAINST J. W. BESS FOR MURDER.—DEC. 2.

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Bess v. Commonwealth.

APPEAL FROM FAYETTE CIRCUIT COURT.

DEFENDANT CONVICTED OF MURDER AND APPEALS. REVERSED.

MURDER—MOTIVE—ADMISSIBILITY OF EVIDENCE—DECLARATIONS OF DECEDENT—INSTRUCTIONS—IDENTIFICATION OF EVIDENCE REJECTED.

Held: 1. In a prosecution for the murder, on March 6th, of a paramour, where the proof is circumstantial, evidence that on December 23d decedent obtained insurance on her house and its contents, which were burned on January 20th, a few days prior to which defendant procured the removal of some of the goods, gratuitously paying the truckman's license fee to the city in addition to his regular charge, and that the loss was paid on February 28th, prior to which defendant had attempted to collect it on the false representation that the policy had been assigned to him, is admissible to show motive for the homicide.

2. In a prosecution for murder, the declaration of decedent a few days before the homicide, to a police officer, that defendant had $220 of her money which he refused to pay, and to recover which she spoke of getting a warrant out against him, is ad-

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missible, having been reported to defendant by the officer before decedent's demise.

3. In a prosecution for homicide, in which evidence was introduced tending to show that the motive was to obtain or retain money belonging to decedent, defendant's declaration that he wished to borrow twenty dollars of decedent, but that she made him a present of it, and gave him $200 more to keep, and that he afterwards, at her request, returned her $100, is admissible.
4. In a prosecution for murder, an instruction that "there may have been" evidence to show some other crime (the evidence not being indicated), and that, if such evidence proved defendant guilty of some other offense "against law or against morals," the jury should not "allow that fact, whatever it may be," to bias them or make them find defendant guilty under the indictment, except in so far "as the fact itself, whatever it may be" conduced to prove him guilty of the crime charged, and that it was the court's duty to tell the jury of the "rejection of certain testimony and the purposes for which other testimony was admitted" (without further identification of the evidence referred to), is so indefinite and ambiguous as to constitute error.
5. Where evidence is ordered rejected after it has gone to the jury, the court, in instructing as to its exclusion, should specify it in detail, and should name the witnesses from whom it has been elicited, in order to identify it.
6. Where evidence otherwise incompetent is admitted for a specific purpose, the court, without quoting it in detail or giving undue prominence to particular facts, should instruct the jury for what purpose alone the evidence is to be considered.

J. N. ELLIOTT AND HENRY G. SNYDER, ATTORNEYS FOR APPELLANT.

On the trial of this case we complain of the following errors to appellant's prejudice:

1. On December 23, 1902, deceased had taken a policy of insurance on her house for $225. The house was burned January 20, 1903. Evidence was admitted that prior to the fire, appellant, in the night time removed from the house nearly all the furniture, and tried, as agent for deceased, to collect the insurance money, but the company refused to pay him, but paid the deceased, Mrs Martin—also that appellant paid the driver of the wagon for hauling away the furniture before the fire, and paid his occupation license as driver to the city. This evidence was objected to by appellant, but was admitted

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as a motive or incentive to obtain the money of deceased with whom appellant had been living in adultery.

We contend this evidence was incompetent:

(1) It tends to connect deceased with the crime of arson for which offense he was not being tried, and is not competent unless the commission of one tends to establish the other, and the connection must be made "natural," "clear," "obvious," "logical," and "necessary." In other words, if the first crime is shown to have been committed by the accused, the mind must instinctively turn to the accused as the perpetrator of the second, and (2) if the commission of the one does not, in and of itself, tend to establish the second, there must be some other evidence showing that it tends to establish the second, and connecting the two crimes.

(3) This evidence, if admissible, was allowed to go to the jury without proper admonition by the court to the jury, as to its effect. The instruction given by the court as to this evidence, was one *general sweeping admonition*, indefinite and vague; leaving the mind in doubt as to what the court meant, when the rule requires it should be *specific, clear* and *distinct.*

(4) The Commonwealth's attorney, in his closing argument to the jury, used the following language in reference to the accused:

"He is a man destitute of all moral nature; he has been false in every relation of life; false to his wife, false to his children, false as a lover, false to his God; that he had never read in history or in fiction, nor had he ever known a man more depraved; that he had boasted of his amours with women, with a bravado that showed him to be guilty of every nature of crime against morality and decency, he was a whoremonger and seemed to be proud of it; that he was a moral degenerate, totally depraved, and had transgressed every law of decency." We submit that such inflammatory denunciation as this with the electric effect of the genius of oratory, could not have otherwise than an effect to inflame the jury, and should not be suffered to go to the jury without a reprimand from the court.

AUTHORITIES CITED.

State v. Fisher, 124 Mo., 460 (27 S. W., 1109); State v. Babbst, 131 Mo., 328 (32 S. W., 1149; State v. Baker, 57 Kan., 541; (46 Pac., 947); State v. Young, 99 Mo., 666, (12 S. W., 879); O'Brien v. Com., 24 R., 2511.

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CLIFTON J. PRATT, AND M. R. TODD, FOR APPELLEE.

Counsel for appellant rely on two alleged errors of the lower court for a reversal.

1. As to the admission of incompetent evidence. The court allowed the Commonwealth to prove that Mrs. Martin, the woman that was killed, took out a policy of insurance on her house and furniture, of $350 ($200 on the house and $150 on the contents) on December 23, 1902, and on January 20, 1903, the house was burned. The loss was compromised for $225, which was paid to Mrs. Martin. Previous to the burning, appellant, in the night time removed from the house nearly all the furniture. Appellant tried to have the insurance agent pay him the money but he refused to do it. There were no questions asked in this case as to whether appellant caused the building to be burned. We claim that this evidence was competent to show a motive for the homicide, and was admitted, under admonition of the court, for this purpose.

2. Conduct of the Commonwealth's attorney.

We insist that the Commonwealth's attorney was justified in addressing the jury as he did. Appellant, on his own motion on the witness stand, put his character in evidence. He stated on direct examination, "he was in the habit of taking his girls to the house of Patsy Mason; that he often hired conveyances to take disreputable women out riding; that he was in the habit of taking women to his room and keeping them all night; that he had two women which he slept with alternately every other night; that he was a married man with a wife and children, but was not living with them. He seemed proud of his career, and explained his damnable life with seeming delight, and it was within the province of the attorney for the State to comment and draw his own conclusions from such testimony.

We submit that in this case the evidence, which was all circumstantial, showed that the deceased, Mrs. Martin, had been taken to a pond and first strangled to death and then thrown into the pond, or reservoir, on Eddy street, in Lexington, where the body was found with marks on her neck indicating finger prints. No water was in her lungs, but they contained air, but no water. He was seen driving in that direction with a woman in a buggy about the time she disappeared, and in the buggy was found hair pins and a lock of hair the color of hers, and the buggy top was torn. Other circumstances were shown pointing to appellant as the guilty man. The evidence authorized the verdict of death. It was an infamous crime, and could only have been planned in the mind of an habitual

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criminal who had no regard in his own private life for decency.

We see no error of law by which the substantial rights of appellant were in any way prejudiced

AUTHORITIES CITED.

Wills Circ. E., 39; Burrill Circ. Ev., 281-285; Rice on Evidence, secs. 278, 348, 155, p. 210; Hester v. Com., 85 Pa., 139; Goerson v. Com., 99 Pa., 388; Swan v. Com., 104 Pa., 218; Sheppard v. People, 19 N. Y., 537; O'Brien v. Com., 89 Ky, 354; Franklin v. Com., 92 Ky., 612; Martin v. Com., 93 Ky., 189; Snapp v. Comm., 82 Ky., 173; Davis v. Com., 6 Rep., 658; Howard v. Com., 24 Ky. Law Rep., p. 950; Cargill v. Com., 93 Ky., 578; Bishop v. Com., 22 R., 1161; Hourigan v. Com., 94 Ky., 520.

OPINION OF THE COURT BY JUDGE SETTLE—REVERSING.

The appellant, J. W. Bess, having been tried, convicted, and given the death penalty in the Fayette circuit court, under an indictment charging him with the murder of Martha McQuin Martin, by this appeal seeks a reversal of the judgment of conviction.

His motion for a new trial, which was overruled by the lower court, contains four grounds, viz.: First, that the court misinstructed, and refused to properly instruct, the jury; second, that the court admitted incompetent evidence, and rejected competent evidence; third, that the verdict is against the law and the evidence; fourth, that the commonwealth's attorney, in his closing argument to the jury, stated facts not in the record—by all of which the appellant's cause is alleged to have been prejudiced to such an extent that he did not have a fair or impartial trial.

As to the first ground it is only necessary to say that no error in the instructions has been pointed out in the elaborate briefs filed by counsel for appellant, and we are of opinion that none could be suggested, for they present with excep-

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tional clearness and brevity all the law applicable to the facts brought out by the evidence. By them the jury were told in what state of case they would be authorized to find the appellant guilty of murder, voluntary or involuntary manslaughter, and what punishment appertained to each; also what would authorize a verdict of acquittal, and what would justify the application of the law of self-defense; while in and through them, separately and as a whole, ran the admonition to the jury to allow appellant the benefit of every reasonable doubt in the matter of determining his guilt or innocence, or, if they found him guilty, in determining the degree of his offense.

As the evidence in the case was in the main circumstantial. in order that we may satisfactorily pass upon the second alleged error complained of, it will be necessary to briefly review the facts upon which appellant's conviction was secured. On Tuesday, March 10, 1903, the body of Martha McQuin Martin was found in the reservoir on Eddy street in or near the city of Lexington, and was identified by persons who knew her well. When the body was removed from the water it was discovered that it contained several scratches on the forehead, and finger prints on the neck. According to the evidence of medical experts, the bruises on her neck were caused by violent pressure of her flesh, and the neck was limber, showing that it had been wrenched or strained. There was an abrasion of the skin over the left eye, sand or earth between the eye lids, and the eyeball was bloodshotten. The body was not bloated, and the post-mortem examination made by the surgeons showed that there was no water in either the lungs or stomach. They were in fact practically normal, and therefore in a healthy condition at the time of the woman's death. The contents of the stomach failed to show the presence of any poisonous substance or opiate.

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According to the testimony of the surgeons, the bruises on the neck and face, the absence of water in the stomach and lungs, and the fact that the body was shriveled, instead of bloated, all went to prove beyond question that the woman's death did not result from drowning, but was caused by violent external means, such as suffocation from choking, or by the wrenching or straining of the neck; and, if her death was thus produced, it would seem to follow that her body was thrown into the reservoir by her slayer to make it appear that she had committed suicide. It appears from the evidence that an illicit intimacy had existed for two years between appellant and the deceased, during which time he had often spent his nights with her at her house, and she had frequently stayed at night with him in the room which he occupied away from his wife and children. On Friday before the finding of the body of the Martin woman the appellant, about the hour of noon, procured a horse and buggy at the livery stable of B. O. Horene, saying he was going out about the reservoir. There was a woman in the buggy with him when he left the stable. She was, as testified to by the stable men, unknown to them, but answered well in personal appearance and dress the description of the woman whose dead body was found in the reservoir. Others who saw appellant and the woman in the buggy that day after they left the stable testified to her resemblance to the body of the woman found in the reservoir. These witnesses seem to have given special attention to the hat and cape worn by the woman riding with appellant, and expressed the opinion that these articles of apparel were the same found on the body of the dead woman. One witness (J. H. Marshall, a letter carrier who knew Mrs. Martin) met appellant on the Friday in question as he and the woman who left the stable in the buggy with him were driving in a suburb of the city,

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and recognized her as Mrs. Martin. When appellant returned the horse and buggy to the stable about 7 o'clock in the evening, the woman who had accompanied him when he drove from the stable was not with him. The buggy in which he took the afternoon ride had red wheels and body and a black top. When he returned it the top was down, and about 10 inches of the back torn out. He called the attention of the owner to the rent, but did not explain to him how it had been made. The same buggy was hired to one Ed. Murray soon afterwards, who found in it in the rear of the seat two hair pins and a hat pin, and also a strand of lady's hair. The hair was the color of Mrs. Martin's, and the hair pins and hat pin were afterwards identified by two of her acquaintances as like some that were owned by her. According to the evidence, no other woman besides the one with appellant rode in the buggy between the time of its return by him and the hiring of it to Murray, and it was not used by a woman while in Murray's possession. After returning the buggy mentioned, the appellant, about 10 o'clock of the same night hired at Horene's stable another horse and buggy, for the purpose, as he then stated, of going to a dance in the country after his son, whom he wished to have return home that night. He did not go that night for his son, but returned the horse and buggy to the stable at 11 o'clock, after an hour's use of it.

The evidence fails to show that Mrs. Martin was seen alive by any one after the buggy ride of Friday afternoon. It is true that one witness testified he knew her by sight, and was of opinion that he saw her pass on the opposite side of the street on Saturday, the day following the buggy ride, but his statement was indefinite, and by no means convincing. Three other witnesses—two of them dentists, and the third a lawyer—testified that they saw in their respective offices, at 5

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o'clock Friday afternoon, a woman whom they took to be Mrs. Martin, and one of the dentists said she told him her name was Martin; but the Commonwealth introduced in rebuttal Georgia Driscoll, who it was proved strongly resembled Mrs. Martin, and she testified that she was the woman who went to the offices of the dentists and lawyer on Friday afternoon. The latter were recalled, and all three of them, upon seeing Georgia Driscoll, positively identified her as the woman they took to be Mrs. Martin, the dentists being able to identify her by a decayed tooth of peculiar shape, which they found in her mouth, and which had been examined by them on the Friday afternoon in question.

Further evidence that the death of Mrs. Martin occurred on Friday afternoon or night was furnished by the testimony of a witness living near the reservoir that he saw the clothing of the dead body floating on the surface of the water on Saturday morning, the day following the buggy ride with appellant, but without knowing or taking the trouble to ascertain what it was. What was supposed to be a bundle of old clothes was also seen in the reservoir by others on Sunday, Monday, and Tuesday, but they, too, were ignorant as to what the object was, until the body was removed from the water.

The medical experts and others informed on the subject testified that in case of death by drowning the body invariably sinks, and will not arise to the surface earlier than three days, but that a dead body thrown into the water will not sink; and the physicians further testified that, in their opinion, the woman whose body was found in the reservoir had been dead from twenty-four to seventy-two hours when the body was removed from the water. There was much testimony to the effect that appellant after the death, and before the finding of the body of the deceased, informed a number of his acquaintances that she had gone from Lexington to

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Seattle, Cincinnati, or Indianapolis is company with another man, and that he (appellant) had quarreled with her, and they had agreed to have nothing more to do with each other. He also informed one or more persons that the deceased had, on one occasion, tried to shoot him, and that she was a "morphine dope," and was liable to commit suicide. One George Bradley testified that he had a conversation with appellant on Wednesday or Thursday before the finding of the body of the deceased, in which he (appellant), in speaking of the deceased, who was then in his room over the barber shop, said he wanted to get rid of this woman up there, and upon being asked "what for," he said he was "afraid she might kill herself up these stairs, and it might be pretty bad." There was also other evidence that after the death and before the finding of the body of the deceased he took some of her personal effects that were in his room, such as a sewing machine and wearing apparel, and distributed them among the colored female residents of the neighborhood. It was also proved that appellant, after his arrest, voluntarily made several contradictory statements that were inconsistent with his innocence, and on the trial a note was introduced in evidence, which he had written, while in jail, to a Mrs. Porter, in which he tried to induce her to testify in his behalf that she was the woman with whom he drove in the buggy from the livery stable on the Friday afternoon before the finding of the dead body of Mrs. Martin, and that it was on her account, and to carry her home through the rain, that he again procured of the same stable the buggy at ten o'clock that night; but she refused to make the desired statements, and on the witness stand denied their truth.

The trial court permitted the Commonwealth to prove that the deceased, on December 23, 1902, obtained a policy of fire insurance of $350 on her house and its contents, that the

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house and what was in it was destroyed by fire on January 20, 1903, and that the loss was compromised on February 28th by the payment to the deceased of $225 by the insurance company. The Commonwealth was also allowed to prove that the appellant, only a few days before the house was burned, procured a wagon and driver, and at night hauled away from the house various articles of furniture and other property, including the sewing machine that he gave away, after the death of Mrs. Martin, which he had caused to be taken to the room occupied by him as a sleeping apartment, and for the services then rendered him by the driver and team he paid the driver one dollar, and shortly thereafter and after the burning of the house, without any request from the driver to do so, he offered to and did pay for him to the city government six dollars for a license to carry on the business of hauling with his express wagon in the city of Lexington. The Commonwealth was further allowed to prove that the appellant attempted to collect of the agent of the insurance company the $225 which it had agreed with the deceased would be paid her for the loss of her house and contents. The agent testified that appellant informed him that he had an order from the deceased for the sum due her, and that the policy had been transferred to him, but the agent refused to pay the money to him, and shortly thereafter paid it to the deceased, who then surrendered to the agent the policy, which had not been assigned to appellant as claimed by him The payment was made to her on February 28, 1903. Her dead body was found on March 10th following. So if, as the evidence strongly conduced to prove, her death occurred on Friday of the previous week, which was March 6th, it is apparent that the insurance money was received by the deceased only six days before her death. If there was fraud or crime in the burning of Mrs. Martin's house, the evidence referred

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to conduced to show that the appellant had some guilty connection therewith.

The agent of the insurance company testified that the sum due the deceased on her loss was paid in two $100 bills, a twenty dollar and a five dollar bill, and it was stated by the appellant on the witness stand that he informed the deceased that he wished to borrow the twenty dollar bill which she received of the insurance agent, but she made him a present of it, and gave him the two $100 bills to keep, and that when he went to his room that night he found her there, and at her request returned her the two $100 bills.

Luke Doyle, a policeman, testified that the deceased, about a week before her death, complained to him that appellant had her money, and she could not get it, and they had some talk about causing his arrest. Shortly thereafter he saw her intercept appellant on the street, and what appeared to be an angry altercation took place between them. On the afternoon of that day appellant went to the witness, and asked him what Mrs. Martin had said to him, and was told by the witness of his conversation with Mrs. Martin, and that she had said he had $200 of her money. Appellant did not deny that he had her money, but said it was merely a breach of trust, and that she could not do anything unless he wanted to give it back to her. On several days in succession the witness said he was talked to by appellant about the matter, and at one time was told by him that he had not given her back the money, but thought he would, and later told him that he had given her $100 of it. On Thursday appellant again met the witness on the street, and asked him if he had seen deceased, and said he was afraid she would shoot him, and on Friday morning (which was the day on the afternoon of which the deceased, according to the evidence, lost her life) appellant inquired of witness whether he had seen

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deceased, and informed him of her having tried to commit suicide, and was told by the witness that she had probably done so, and nobody knew anything about it. To one or two others appellant said he had returned to the deceased $100 of her money, but no money was found on her body when removed from the water, though one of her stockings was found to be released from the suspender and pulled down, and one of her female acquaintances testified on the trial that she had known deceased to carry money in her stockings.

The appellant, in testifying before the jury, made a general denial of nearly all of the facts brought out by the witnesses for the Commonwealth, but seeemed to have but little support from other witnesses introduced in his behalf.

It is insisted for appellant that it was error to allow the introduction of evidence in regard to the insurance upon the house and household effects of the deceased, and of the conduct of the appellant in removing the furniture and other property from the house, to which the driver of the express wagon testified, or to allow the introduction of evidence as to what passed between the appellant and the driver in regard to the payment by the former of the latter's license, and likewise error to permit the introduction of evidence in regard to the burning of the house, or as to the payment to the deceased of the insurance money, or the attempt on the part of the appellant to collect it. We are of the opinion that all of the evidence mentioned was competent to show a motive for the homicide. If the appellant took the life of the deceased, the crime was not committed without motive. There are, indeed, few motiveless crimes, and among the motives impelling men to crime is gain. In Burwell on Cir. Ev., section 285, it is said: "The motive of gain, in a stricter sense of the term, may exist by two different classes of objects: First, by something visible and tangible, which the party medi-

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tating the crime desires to possess; and, secondly, by some substantial benefit which is expected to accrue as a result of the comtemplated act." In O'Brien v. Commonwealth, 89 Ky. 354, 11 R., 534, 12 S. W., 471, this court said: "Necessarily, where the commission of crime can be shown only by proof of circumstances, the evidence should be allowed to take a wide range, otherwise the guilty would often go unpunished. It is true there must be some connection between the fact to be proved and the circumstances offered in support of it, yet any fact which is necessary to introduce or explain another, or which afforded an opportunity for any transaction which is in issue, or shows facilities or motives for the commission of the crime, may be proved. Even evidence tending to prove a distinct offense is therefore admissible if it shows facilities or motives for the commission of the one in question. . . ." In a more recent case decided by this court, the style of which is also O'Brien v. Commonwealth, 115 Ky., 608, 24 R., 2511, 74 S. W., 666, the authorities bearing on the question under consideration are elaborately reviewed, and no better statement of the principle involved can be found than is contained in Bishop's New Crim. Proc., vol. 1, section 1126, quoted with approval in the opinion in that case: "The intent, knowledge, or motive under which the defendant did the act charged against him not generally admitting of other than circumstantial evidence, may often be aided in the proof by showing another crime actual or attempted, then it is permissible." We find, therefore, that the true doctrine deducible from the foregoing authorities is that all the evidence admitted must be pertinent to the point in issue, and, if it be pertinent to the point, and tends to prove the crime alleged, it is not to be rejected, though it also tends to prove the commission of other crimes, or to establish collateral facts. If there was a conspiracy between the deceased and the de-

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fendant to insure her property and then destroy it to secure the insurance, and by that means the insurance money, or some part of it, went into appellant's hands, when it became apparent to him that deceased would compel its return to her even by his arrest, who can say whether the murder, if committed by him, resulted as a means of preventing his arrest for some connection with the burning of her house or to enable him to keep the money? In either event the motive would be manifest. At any rate, it was for the jury to determine from all the evidence whether or not either motive existed, and we think for this reason that the evidence complained of was competent.

We are, however, of opinion that the trial court erred to the appellant's prejudice in not explaining to the jury the full purpose and effect of this evidence. The admonition of the trial judge to the jury on this point, as found in the bill of evidence before us, is as follows: "Gentlemen of the jury, there have been certain witnesses who have testified in this case about statements purporting to have been made by Mrs. Martin. As to that evidence, and whatever evidence has been given to you as to any statements made by Mrs. Martin, that evidence ought to be altogether disregarded by the jury, as if it had not been heard. Her statements, if made as detailed by any witnesses, are not competent testimony, and the jury should disregard it entirely. There may have been evidence in this case tending or not, as the jury may think, to show that the defendant has been guilty of some other crime or offense than the one charged in the indictment. In so far as any evidence of that kind has been admitted, it should not bias the mind of the jury; nor your belief, if any you have, that this defendant committed some other offense than the one charged in the indictment, lead you to find a verdict against him upon this charge, except in

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so far as the fact itself, whatever it may be, throws light upon the charge in this indictment. That is to say, if you believe from the evidence that some other offense, either against the law or against morals, has been proved against the defendant, you ought not to allow that fact, whatever it may be, as competent evidence for you to consider in so far as it bears upon this charge, but it should not bias your mind, and make you find this defendant guilty in this indictment, any more than if it had not been admitted, except in so far as the fact itself, whatever it may be, conduces to prove the defendant guilty of this charge; and it is my duty that I should tell you as to the rejection of certain testimony, and the purpose for which certain other testimony is admitted, and you owe it to yourselves as jurors to maintain your solemn oath, and be governed by the injunction of the court." By this charge the jury were directed to disregard all statements detailed by the witnesses as emanating from Mrs. Martin. The greater part of her statements were incompetent for any purpose, but some of them were manifestly competent; such as her conservation with the policeman, Luke Doyle but a few days before her death, in which she complained to that officer that appellant had $220 of her money, which he refused to pay her, and to recover which she spoke of getting out a warrant against him, for that conversation was reported by Doyle to appellant before the death of Mrs. Martin. The ruling of the court likewise excluded from the consideration of the jury the statements of the appellant relative to the alleged declarations of Mrs. Martin as to her purpose in placing in his hands the money received by her of the insurance company, made to him at the time the money was given him. We think these declarations were competent for the purpose of explaining the circumstances under which appellant received the money, and also to contradict the state-

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ment made by Mrs. Martin in her conversation with Doyle which the latter subsequently reported to appellant. It is true that the exclusion of the testimony of Doyle as to the statements made to him by Mrs. Martin was not prejudicial to the appellant, but we are unable to say that the exclusion of the latter's testimony as to the declarations of Mrs. Martin accompanying the placing of the money in his hands was not so. We are of the opinion that the admonition of the circuit judge was so indefinite and ambiguous that it was, on the whole, more calculated to confuse than to enlighten the jury. It was an attempt by the court to instruct the jury as to the consideration to be given evidence that "may have been" admitted in the case, which, in their opinion, might or might not tend to prove the appellant guilty of some crime or offense other than that charged in the indictment, without indicating what evidence had been introduced that was likely to superinduce such an opinion, or what crime or offense other than that named in the indictment was referred to. The jury were also told, in effect, that, if the evidence thus vaguely referred to proved the appellant guilty of some other offense "against the law or against morals," they ought not to "allow that fact, whatever it may be," to bias their minds, or make them find the appellant guilty under the indictment, any more than if it had not been admitted, except in so far "as the fact itself, whatever it may be," conduced to prove him guilty of the crime with which he was charged. This part of the charge is but a repetition of what went before, and is well calculated to further obscure the meaning of the court and mislead the jury.

Near the conclusion of the admonition the jury were further told by the court that was his duty to tell them of the "rejection of certain testimony and the purpose for which certain other testimony was admitted;" but neither in that

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connection, nor elsewhere in the admonition, except as to the statements of Mrs. Martin, already referred to, was it stated what evidence was rejected, although there was other evidence rejected by the court. The trial judge should have admonished the jury in explicit language what evidence was excluded from their consideration, specifying it in detail; and, if its rejection was not ordered until after it had gone to the jury, it would have been proper for the court, in excluding it, to name the witnesses from whom it had been elicited, in order that the jury might the better understand what evidence, and how much of it, was not to be considered by them. But when evidence otherwise incompetent is admitted for a specific purpose, a somewhat different rule should obtain. In that event, the trial judge in apt language, and without quoting it in detail, or giving undue prominence to particular facts, should inform the jury for what purpose alone the evidence is to be considered by them. Pursuant to this rule, the jury in the case at bar should have been told by the court that, though they might believe from the evidence beyond a reasonable doubt that the burning of the house of Mrs. Martin was done, or procured to be done, by her, with the felonious intent to thereby defraud the insurance company of the amount for which the same or its contents was insured, and further believe from the evidence beyond a reasonable doubt that the appellant, with like intent and purpose, did aid, assist, and advise her in such burning, if any, such of the evidence, if any, as tended to prove that fact, might be considered by the jury, in connection with all other evidence in the case, only in determining whether or not the appellant had, or was thereby furnished, a motive for the murder of Mrs. Martin. As a further safeguard to the rights of the appellant, and by way of putting the admonition in another form, the court might also have told the jury that none of the

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evidence in regard to the burning of the house, the removal of its contents, or any part thereof, by the appellant, before the fire, or as to the payment by the insurance company of the loss thereon—though they might believe from such evidence beyond a reasonable doubt that appellant was a guilty participant in the crime, if any, of burning the house, or the fraud, if any, thereby practiced upon the insurance company—should be considered by them, except for the sole purpose of determining whether or not it conduced to prove a motive on the part of appellant for the murder of Mrs. Martin. In the same manner, and with equal circumspection, the court should have admonished the jury as to the purpose for which they might consider the evidence in regard to the illicit relations that existed between the appellant and Mrs. Martin at the time of her death and for the previous two years.

We find but little merit in the objection urged by the appellant to the statements of the Commonwealth's attorney set forth in the bill of exceptions. The language complained of was severe in its arraignment of the appellant, but not abusive, and we are unable to say that it was not warranted by the evidence. The conduct of the appellant, as shown by the evidence, his admissions, while upon the witness stand, of moral turpitude, much of which was voluntary and unnecessary, afforded justification for what was said by the Commonwealth's attorney.

Because of the error of the trial court in failing to properly admonish the jury as to the effect and purpose of the evidence that was competent only to show motive, and of its further error in rejecting evidence of certain of the statements of Mrs. Martin, the judgment is reversed, and cause remanded, with directions to the lower court to set aside the verdict

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and judgment and grant appellant a new trial, and for further proceedings consistent with the opinion herein.

CASE 101—ACTION BY MIKE SCHERM AGAINST W. I. SHORT, SHERIFF OF DAVIESS COUNTY, AND SAM JONES, ADMR. OF JESSIE GARRETT, DECEASED, TO SET ASIDE AN EXECUTION SALE OF LAND.—DEC. 2.

Scherm v. Short, Sheriff, &c.

APPEAL FROM DAVIESS CIRCUIT COURT.

JUDGMENT DISMISSING THE PETITION AS TO THE DEFENDANT, SHORT, AND PLAINTIFF APPEALS. AFFIRMED.

DRAINAGE DITCHES—SPECIAL ASSESSMENTS—LIEN—ENFORCEMENT—INDIVIDUAL LIABILITY OF LANDOWNER.

Held: 1. Act March 23, 1900; Laws 1900, p. 110, c. 30 (Kentucky Statutes, section 2400), relative to the construction of drainage ditches, etc., provides that on the completion of an allotment of a ditch the county surveyor shall give the land owner a certificate, which shall state the amount due the contractor for constructing the ditch, which amount shall be a lien on the land; and that, if any land against which an assessment has been made shall change hands, the sheriff shall give the new owner notice of the amount due, and on failure to pay, that the land shall be sold to satisfy the tax. HELD, that the assessment is not a claim against the owner individually, but against the land itself, which is liable to sale for satisfaction of an assessment, notwithstanding that the one to whom it was assessed has personal property from which the assessment might be satisfied.

R. G. HILL, ATTORNEY FOR APPELLANT.

CLASSIFICATION OF QUESTIONS.

1. The office of sheriff is ministerial, and not judicial, and when a sheriff exceeds his power, he is liable for damages, in an action for tort. Bouvier's Dictionary; Sedgwick on Damages, vol. 2, secs. 543, 544; Herman on Executions, p. 146; 8 B. Monroe, 109; 3 A. K. Marshall, p. 981; 3 Metcalfe, p. 314.

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2. A sheriff who sells land for taxes when there is personal property out of which taxes can be made, is guilty of a tort, and liable for damages. Kentucky Statutes, secs. 4151, 4150, 16 R., 837; Ency. Plead. & Prac., vol. 20, p. 24, 11 B. Mon., p. 183

SWEENEY, ELLIS & SWEENEY, FOR APPELLEE.

The Drainage Act, Kentucky Statutes, section 2400, provides: "When the county surveyor or engineer, heretofore provided for, accepts (the ditch) and issues his certificates of acceptance, he shall file with the county court clerk a copy thereof, whereupon the clerk shall charge the amount mentioned in said certificate on the tax books against the land assessed with such allotment, to be collected as other taxes are collected, together with six per cent. for the holder of the certificate after the same becomes delinquent, and when collected, it shall be paid to the person holding the certificate by the tax collector."

The county clerk places the charge on the sheriff's books.

The sheriff could do no less than sell the land as the assessment is against the land.

If Pettit did not own the land at the time of the assessment, there was no debt against him, and appellant can not complain that the sheriff did not make the debt out of Pettit.

The sheriff has done nothing for which he should be mulcted in damages, and appellant, according to his own statement, has suffered no injury or damage. Allen v. Wood, 20 R., 59.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—AFFIRMING.

The appellant, Mike Scherm, brought this suit in the Daviess circuit court against the appellee, Sam Jones, as administrator of Jessie Garrett, deceased, and W. I. Short, sheriff of Daviess county, to set aside and vacate a sale of land made by the appellee Short, as sheriff of Daviess county to Jessie Garrett, to satisfy an assessment for a drainage ditch made pursuant to the provisions of the act of March 23, 1900, and which is recited between sections 2380 and 2417, inclusive, of the Kentucky Statutes. Appellant alleges in his petition that he purchased the tract of land sold by the sheriff on the 15th day of February, 1902, and that on

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the 20th of October, 1902, the defendant, as sheriff, levied upon and sold this land to satisfy an assessment against Thomas S. Pettit, as owner thereof, for the construction of a drainage ditch; and that the defendant, Sam James, as administrator of Jessie Garrett, became the purchaser thereof; and that Short certified the sale and purchase to the clerk's office of the county court for record. A copy of the certificate of sale made by the sheriff is filed with the petition as a part thereof, and is as follows:

"Commonwealth of Kentucky, County of Daviess. No. 7,174. This is to certify that I have an assessment due and unpaid against the land hereinafter described, in the action of J. B. Bryan on petition for a ditch, listed with me for collection, and I did levy on that certain tract of land assessed in the name of T. S. Pettit, lying in Daviess county, bounded on the north by the land of the Mutual Life Insurance Company, of Kentucky, on the East by the land of Frank Ebelhar, on the South by the Louisville and Nashville R. R., containing forty acres, more or less, being assessed as the land of Thomas S. Pettit, and afterwards conveyed to Mike Scherm by J. G. Hill, and advertised according to law for the 20th of October, 1902, it being county court day, and between 10 a. m. and 2 p. m., did sell the land above levied on after offering a less number of acres for the amount of said assessment, levy and commission, when Sam James, Jr., administrator, became the purchaser thereof. Given under my hand this 20th day of October, 1902. W. I. Short, sheriff.

"Assessment $146.75, cost $14.20,—total, $160.95.

"Commonwealth of Kentucky, County of Daviess. I. J. T. Griffith, clerk of the Daviess county court, do certify that the foregoing certificate of land sold for assessment, assessed in the name of Thomas S. Pettit, in proceedings of J. B.

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Bryan, etc., on petition for a ditch, was this day lodged in my office, and admitted to record. Witness my hand, this 10th of November, 1902.

"J. T. GRIFFITH, Clerk."

The plaintiff further alleges that at the time of the levy and sale Thomas S. Pettit had sufficient personal property out of which the taxes could have been made; that the land levied on and sold by the sheriff to satisfy the ditch assessment had been assessed as the property of Thomas S. Pettit, but that he was not in fact the owner thereof at the time of such assessment, or liable for the assessment against such land; and prayed that the levy and sale made by the sheriff should be set aside. The defendant Short interposed a general demurrer to plaintiff's petition, which was sustained, and the petition as to him dismissed. Plaintiff asks a reversal of the judgment upon the ground that it was the duty of the sheriff to have collected the assessment by a sale of the personal property of Thomas S. Pettit, the alleged owner against whom the assessment was made. Section 21 of the act of March 23, 1900 (Laws 1900, p. 110, c. 30), provides: "It shall be the duty of the county surveyor or engineer, on being notified by any landowner that his allotment, or by any contractor that his job, is completed to inspect the same; and if he find that it is completed according to the specifications of the report on which the ditch was established, he shall accept it and give the land owner, or, in case the job has been sold to the contractor, a certificate of acceptance, stating that said allotment or job is completed according to such specifications. And if any share or allotment has been sold to a person, not the owner of the land assessed therefor, he shall in addition, state the amount due the contractor for constructing the same from the owner of the land, which certificate shall be a lien on the land as-

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sessed for such share or allotment, and shall be due and payable immediately by the owner of the land; and if the allotment sold belongs to a non-resident of the county, the clerk shall state such fact when he offers it for sale. And when the county surveyor or engineer, heretofore provided accepts it and issues his certificate of acceptance, he shall file with the county clerk a copy thereof, whereupon the clerk shall charge the amount mentioned in said certificate on the tax book against the land assessed with such allotment to be collected as other taxes are collected, together with six per cent. for the holder of the certificate after the same becomes delinquent, and when collected, it shall be paid to the person holding the certificate by the tax collector, and said tax collector shall receive four per cent. for collecting the same, to be paid by the certificate holder." It will be observed that the assessment is against the land, and a lien is given by the statute on the land to secure the payment of such assessment. There is a marked distinction between local assessment of this character and taxes levied for general revenue purposes. They are not levied for the purpose of sustaining the government, but are charges against specific property, because the property itself is supposed to receive a special benefit therefrom different from the general one which the owner enjoys in common with other citizens of the Commonwealth. This question was very fully considered by this court in Gosnell v. City of Louisville (104 Ky., 201, 20 R., 519), 46 S. W., 722, and it was there held that an assessment of this character was not a tax within the meaning of sections 157, 171, 172, and 174 of the Constitution, limiting the tax rate of cities, and requiring equality and uniformity of taxation. A very full discussion of the question is found in Elliott on Streets & Roads, c. 25. The assessment for the construction of the

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ditch under the statute was not a claim against the owner of the land in his individual capacity, but an assessment against the land itself. And the statute provides that, if any land against which such an assessment has been made shall have changed hands, the sheriff shall give the new owner notice of the amount due and assessed against the property, and, in the event of his failure to pay, that the land shall be sold to satisfy the tax. It follows, therefore, that the demurrer was properly sustained.

Judgment affirmed.

Petition for rehearing by appellant overruled.

CASE 102—ACTION BY COMMONWEALTH BY S. T. BAILEY, SHERIFF OF GREENUP COUNTY TO COLLECT TAXES ON PROPERTY OF THE C. & O. RAILWAY CO., OMITTED.—DEC. 3.

Commonwealth v. Chesapeake & O. Ry. Co.

APPEAL FROM GREENUP CIRCUIT COURT.

FROM A JUDGMENT IN THE CIRCUIT COURT FOR DEFENDANT, THE COMMONWEALTH APPEALS. AFFIRMED.

TAXATION—CORPORATE STOCK—SITUS—RESIDENCE OF OWNER—RAILROADS—BAILEES OF STOCK.

Held: 1. A railroad corporation is not a bailee in possession of its capital stock, within the meaning of Kentucky Statutes, 1899, section 4023, providing that the bailee in possession of property on a certain date shall be liable for taxes thereon; and an allegation, in proceedings by the sheriff to list such property, that the corporation is such a bailee, is a mere conclusion of law.

2. Kentucky Statutes, 1899, section 4058, requiring the taxpayer to list in his schedule the amount of stock in joint stock companies or associations of the State not paid in by the company or association, shows conclusively that stock in corporations is to be listed for assessment by the individual stockholder in

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the county in which he gives in his assesment, and not by the corporation.

W. T. COLE, AND A. E. COLE & SON, FOR APPELLANT.

W. H. WADSWORTH AND E. L. WORTHINGTON, FOR APPELLEE.
(No briefs, record misplaced.)

OPINION OF THE COURT BY JUDGE BARKER—AFFIRMING.

Samuel T. Bailey, the sheriff of Greenup county, Kentucky, instituted this proceeding in the county court of Greenup, under section 4241 of the Kentucky Statutes, authorizing the sheriff to list omitted property. The proceeding was commenced by filing in the Greenup county court a statement, in the form of a petition, which sets forth substantially the following: That the Chesapeake & Ohio Railroad Company consists of three corporations: First, a corporation created by the laws of the State of Virginia; second, a corporation created by the laws of the State of West Virginia; and, third, a corporation created and existing under, and by virtue of the compliance with, sections 194 and 211 of the Kentucky Constitution, and sections 571 and 841 of the Kentucky Statutes. That these corporations have one or more places of business in Greenup county, with an authorized agent or agents thereat, upon whom process can be served; and, by their compliance with the Constitution and statutes of Kentucky, they, as well as the stockholders, agreed and undertook to submit to the laws of this Commonwealth, and especially that the situs of the stock in the corporations should be for the purpose of taxation within this Commonwealth. That these three corporations jointly own and possess and operate a line of railway beginning at Covington, and running along the Ohio river, through Greenup county, to Ashland, Kentucky, and through the State of West Virginia to Newport News, in the State

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of Virginia. That on or about the 1st of January, 1899, the Virginia and West Virginia corporations entered into a written contract with the Maysville & Big Sandy Railroad Company, by which they leased its line of road, extending from Covington, through Greenup county, to Ashland, Kentucky, for a term of ninety-nine years, with the right of perpetual renewal. That neither of these corporations, or any one for them, has ever listed this lease for taxation, and it has been entirely omitted by the assessor of Greenup county, and the assessor of every other county in this State, and by all other officers whose duty it is to list the property or assess it, including the Railroad Commission and the Board of Valuation and Assessment for the State. That neither of these corporations has ever paid any taxes to the Commonwealth on this lease. That they have, since the —— day of ——, 1893, and prior thereto, exercised a franchise continuously within this Commonwealth, and neither of them has ever reported to the Railroad Commission, or the Board of Valuation and Assessment, or any one else, the value of this franchise or franchises for taxation, and they have been wholly omitted by the Board of Valuation and Assessment, the Railroad Commission, and every other officer whose duty it is to attend to these matters. Nor has any taxation been paid to the Commonwealth by any of the corporations on their franchises, although these franchises are of the value of $20,000,000 in the open market, and the lease is of the value of $15,000,000 in the open market. That the capital stock of each corporation has been at all times of the value of $62,525,000, divided into shares of the par value of $100 each, and that this stock has always been worth par value in the open market. This stock has been owned and held by divers and sundry persons, whose names appellant has not been able to ascertain, but which are all well known

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to the appellee. That, by reason of the failure of the corporations to pay taxes on their corporate property, the stockholders therein should have listed their stock for assessment and taxation, but they have wholly failed and refused to do so, and the stock has been wholly omitted by the assessor of Greenup county, the Board of Valuation and Assessment, the Railroad Commission, and every other officer in this State whose duty it is to cause it to be listed, and no taxation has ever been paid thereon to the Commonwealth. That the capital stock, surplus, reserve fund, franchises, good will, and business opportunities and possibilities of the corporations which represent the stock belonging to the stockholders have at all times been in the possession, physical control, and keeping of the corporations, as bailees of the stockholders thereof, and that therefore the different corporations are liable to the Commonwealth on account of taxes due from their stockholders on their stock for the years from 1892 to 1902, inclusive. Wherefore it was prayed that the defendant corporations be compelled to list in their own name, as bailees in possession, the stock of their stockholders, and that it be assessed against the corporations, as bailees in possession, for each and every year, beginning with 1892, up to and including the year 1902. A demurrer was filed by appellee, which was sustained by the judge of the county court, and the petition dismissed, whereupon appellant prayed an appeal to the circuit court, where a demurrer was again filed and sustained, and the petition dismissed from which judgment this appeal is prosecuted.

It is the theory of appellant that, because the corporations have failed to list and pay taxes due upon the corporate property, therefore all of the individual stock held by the stockholders in the corporations becomes at once liable for taxation in Greenup county, Kentucky, without refer-

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ence to the residence of the owner. This theory is based upon sections 4020 and 4088 of the Kentucky Statutes of 1899, which are as follows:

"Sec. 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, . . . shall be subject to taxation, unless the same be exempt from taxation by the Constitution and shall be assessed at its fair value estimated at the price it would bring at a fair voluntary sale."

"Sec. 4088. The individual stockholders of the corporation which are, by this article, required to report and pay taxes upon its corporate franchises, shall not be required to list their shares in such companies, so long as the corporation pays the taxes on the corporate property and franchises, as herein provided."

By these sections it is contended that the stock of the individual stockholders, upon the failure of the corporation to pay its just taxes, at once becomes liable to taxation in any county through which the road runs, and in which it has an agent upon whom process can be served.

Sections 4077 to 4086, inclusive, of the Kentucky Statutes, contain an elaborate and thorough system for the assessment and collection of taxes from a large class of the important corporations of the State, including railroads, both foreign and domestic. By this system the Board of Valuation and Assessment is established, whose duty it is, upon information obtained in the manner therein set out, to assess the franchises of these corporations, and to certify to the various counties, municipalities, and taxing districts the amounts liable to them, respectively, for local taxation. Conceding it to be true, for the purposes of this case, that by

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section 4088 the stock of the individual stockholders of a railroad corporation becomes liable to taxation if the corporation itself fails to pay the taxes on its corporate property and franchises, it does not follow that this stock is taxable anywhere else than the residence of the owner. Section 4052 is as follows: "All taxable estate shall be assessed and valued as of the fifteenth of September in the year listed, and the person owning or possessing the same on that day shall list it with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with the same." Section 4023: "The holder of the legal title, and the holder of the equitable title, and the claimant or bailee in possession of the property, on the fifteenth of September of the year the assessment is made, shall be liable for taxes thereon; but, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment." The corporations in question are not the bailees in possession of the individual stock, within the meaning of the sections of the statute above quoted, and the allegation of the petition to that effect is a mere conclusion of law. On this subject the petition states: "Plaintiff states that the capital stock, surplus, reserve fund, franchises, good will, and business opportunities and possibilities of said corporations which represent the stock belonging to the stockholders of said corporations have at all times herein mentioned been in the possession, physical control, and keeping of the defendant corporations, as bailees of the stock of said stockholders, and by virtue thereof said defendants are liable to this Commonwealth on account of taxes due from the said stockholders in said corporation on their stock from the year 1892 up to and including the year 1902." It will be observed that the allegation is that the corporate

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property "has been in the posesssion, physical control, and keeping of the defendant corporations as bailees of the stock of said stockholders." Undoubtedly the corporate property has been in the possession and control of the corporation, but not as bailees of the stockholders. The corporate property belongs to the corporation, and is, of course, rightfully in the possession of its owner. The shares of stock belonging to the stockholders are mere certificates showing the respective interests of the various holders in the corporate property; but it is well settled that the capital stock of a corporation, and the shares of stock held by the stockholders, for the purpose of taxation, may be, and generally are, entirely distinct property. Shares of stock are personal property belonging to the shareholder, and, as such, it is taxable, if taxed at all, at the residence of its owner. In the case of Wren v. Boske, Sheriff, 24 R., 1980, 72 S. W., 279, on the subject of the situs of personal property for taxation, this court said: "We are referred to a number of decisions holding that personal property of non-residents of the State, which has obtained a situs in the State, may, if the Legislature so provides, be taxed in that State, and the same rule no doubt would apply between the different counties of the same State if the Legislature so provided. But the question after all is one of legislative intent. By our statute land shall be listed in the county in which it is located. Kentucky Statutes, section 4025. The assessor calls on the taxpayers, and takes their lists. Kentucky Statutes, section 4044. Personal property of every kind must be stated and valued separately from real estate. Section 4050. All taxable estate shall be assessed as of September 15th, and the person owning or possessing it on that day shall list it with the assessor. Section 4052. The assessor, before returning any one as delinquent, must apply at his residence. Section

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4065. There is no provision in the statute anywhere for the assessment of personal property in the county in which it is situated, although there are such provisions as to the assessment of land; and, taking the whole statute together, we think it reasonably clear that the Legislature contemplated that personal property was to be given in by the taxpayers in the county of their residence. In Jones v. Commonwealth 53 Ky., 2, this court said: 'By the general law, the owners of property subject to taxation are called on and give in their lists in the county in which they reside, though the property may be in other counties.' Again, in Gates v. Barrett, 79 Ky., 296, 2 R., 318, the court said: 'In general, movable property is to be assessed for taxation at the place of the owner's residence.' Also Boske, Sheriff, v. Security Trust & Safety Vault Co., (22 R., 181) [56 S. W., 524]; Covington v. Whayne (22 R., 826) [58 S. W., 776]." In the case of Langdon-Creasy Co. v. Trustees of Owenton Common School District (opinion filed Oct. 28, 1903) 116 Ky., 562, 25 R., 823, 76 S. W., 381, it was held that the personal property of a corporation which had branch houses in several counties of the Commonwealth was taxable, not where the branch business was carried on, but in the county where the corporation had its residence and principal place of business; in other words, that the situs of the personal property for taxation was the residence of the owner. All doubt on the question involved in this action seems to be set at rest by the fact that the schedule required by section 4058 to be furnished the taxpayer for the purpose of listing his property provides for the listing of stock in corporations which have not paid the taxes due by them. Item 10 of the schedule is as follows: "Amount of stock in joint stock companies or associations of this State not paid on by the company or association." This shows, conclusively, that the stock in the cor-

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poration is to be listed for assessment by the individual stockholder in the county where he gives in his assessment. The statute authorizing the assessment and taxation of personal property in the hands of the bailee in possession refers to personal property held by one person for the use of another. This is not true in the case at bar. The shares of stock are in the possession and under the control of the individual stockholders, and not in the hands of the corporation, at all. The stock sought to be taxed in this case in Greenup county is perhaps scattered throughout the commercial centers of the world. It is being bought and sold day by day on the stock exchanges of New York, London, Paris, Berlin, and other cities. It is constantly changing hands, and can not, therefore, be considered, in any sense, in the possession of the corporation. It would be a strange rule of fiscal law which would authorize the taxation of $62,525,000 of stock in this large corporation in Greenup county, when it does not appear that one share of it is owned by a resident of that county. As said in the case of City of Louisville v. Sherley, 80 Ky., 71, 3 R., 566: "The proper place to list personal property in this State, or, rather, its value under the equalization law, is in the county where the owner lives."

As this was the conclusion reached by the trial judge, the judgment is affirmed.

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CASE 103—ACTION BY W. T. MCCULLOUGH AGAINST CLIFFORD SHINKLE FOR PERSONAL INJURIES.—DEC. 3.

Shinkle v. McCullough.

APPEAL FROM KENTON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

HIGHWAYS—NEGLIGENCE—AUTOMOBILES FRIGHTENING HORSES—EXCESSIVE SPEED—INSTRUCTIONS.

Held: 1. In an action for injuries sustained by plaintiff by his horse havinig been frightened by defendant's automobile, which it was alleged was running at an excessive speed, defendant and another witness testified that the operation of the machine was always accompanied by noise. The court instructed that if defendant was operating the automobile at a high rate of speed, and because thereof, or because of such speed together with the noise, the horse became frightened, and defendant's conduct in operating the automobile at such speed was negligence, plaintiff was entitled to recover. HELD, that if there was any error in the instruction, in that it authorized the jury to find for plaintiff if they believed the horse became frightened either at the speed or the noise, while fright by the noise was not pleaded, it was not prejudicial.

2. In an action for injuries sustained by plaintiff because of his horse having been frightened by defendant's automobile, which was running at an excessive speed, evidence of a statement alleged to have been made by defendant on the trial in justice's court in an action for repairs to the buggy injured in the accident complained of, to the effect that he considered himself responsible for the accident, was admissible as tending to contradict defendant's testimony on the trial to the effect that he had not been guilty of negligence.

3. Where one operating an automobile on a public highway knew, or by the exercise of ordinary care could have known, that the machine had so far excited a horse as to render him unmanageable, it was his duty to stop and take steps such as prudence might suggest.

4. Where, in an action for injuries sustained by plaintiff by his horse having been frightened by defendant's automobile, the testimony showed that, in addition to superficial bruises, the

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vision of one of plaintiff's eyes had been permanently and seriously impaired, a verdict for $1,020 was not excessive.

W. A. PRICE, ATTORNEY FOR APPELLANT.

POINTS AND AUTHORITIES.

1. Instruction to the jury. By instruction No. 2, the court submitted to the jury the question, not made by the pleadings, as to whether appellee's horse became frightened by the noise emanating from the automobile, and thereby caused the injury, which was error and prejudicial to appellant. Sandy River & Cannel Coal Co. v. Caudill, 21 Ky. Law Rep., 1647; Purdom v. Brussels, 23 Ky. Law Rep., 1796; South Cov. & Cin. St. Ry. Co. v. Stroh, 23 Ky. Law Rep., 1807; McCain v. L. & N. R. R. Co., 13 Ky. Law Rep., 809; Greer v. L. & N. R. R. Co., 94 Ky., 169; L. & N. R. R. Co. v. McGary's Admr., 104 Ky., 509.

By the same instruction an issue not supported by the proof was submitted to the jury, viz.: As to whether the horse became frightened at the automobile by reason of its speed.

2. Evidence—Admissions. The court permitted to go to the jury testimony as to an alleged admission by appellant, which was a statement that contained no fact whatsoever, but which at best was a mere conjecture or opinion upon the facts observed. Greenleaf on Evidence, (15th ed.), sec. 440 and notes, sec. 203; Jones v. Commonwealth, 20 Ky. Law Rep., 356; Collins v. Commonwealth, 12 Bush, 272; Pace v. Commonwealth, 89 Ky., 204; Starr v. Commonwealth, 97 Ky., 193; Henderson v. Commonwealth, 5 Ky. Law Rep., 244; Luker v. Commonwealth, 9 Ky. Law Rep., 385; Owens v. Commonwealth, 22 Ky. Law Rep., 514.

3. Excessive damages. The verdict is excessive in the absence of any testimony as to appellee's earning capacity, and the failure upon his part to prove that the injury to his eye resulted from the injury complained of.

JOHN W. HENVER AND M. H. McLEAN FOR APPELLEE.

SUMMARY.

We submit:

1. That driving an automobile at an immoderate and dangerous rate of speed along the public highways is actionable negligence.

2. Where, by fast and reckless driving of the appellant, of

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his automobile, the appellee's horse was frightened and turned over his buggy, severely injuring him by throwing him to the ground causing his head to strike on the roadway, bruising him and causing permanent injury to his right eye, that a verdict of a properly instructed jury awarding him $1,020 in damages is not excessive.

AUTHORITIES CITED.

Law of the case. Speed. Payne v. Smith, 4 Dana, 498; Thomas' Admr. v. Royster, 98 Ky., 206; Elliiot on Roads, sec. 839. As applied to novel vehicles: Atkinson v. Ill. Milk Co., 44 Mo. App., p. 156; Bennett v. Lovell, 12 R. I., 166; Macomber v. Nicholls, 34 Mich., 212; Mason v. West, 70 N. Y. Suppl., 478. Instructions and pleadings. Chitty on Pleading, vol. 1, sec. 673; Bliss on Code Pleading, ch. on Intendment after Verdict; Tye v. Catchings, 78 Ky., 463. As to construction. Lou. Trust Co. v. Lou. Fireproof Co., 22 Ky. Law Rep., 436; Daniel v. Holland, 4 J. J. M., 18; Wilson v. Hunt's Admr., 6 B. M., 379; Rogers v. Felton, Receiver, 98 Ky., 150; Cin., &c. R. R. Co. v. Barker, *et al.*, 94 Ky., 79; Brown v. Brady, 10 Ky. Law Rep., 280. Excessive damages. Alexander v. Humber, 86 Ky., 570; Mays. & Lex. R. R. Co. v. Herrick, 13 Bush, 127; Alexander v. Menefee, 23 Ky. Law Rep., 1151; Thurston v. Martin, 22 Ky. Law Rep., 781. Instruction No. 7. Damages. Sedgwick on Damages, sec. 45; Alexander v. Humbert, 86 Ky., 570; Klutts v. St. L., Iron Mt. & Sou. R. R. Co., 75 Mo., 644; Ency. Plead. & Prac., vol. 11, pp. 127, 128, 129, 181 and cases there cited. Admissions. Greenleaf on Evidence, sec. 169, p. 244; Ibid, sec. 191, p. 266; Ibid. sec. 194, pp. 269-270; Mercer v. King, 15 Ky. Law Rep., 439; Greenleaf on Evidence, sec. 203. Dying declarations. Haney v. Com., 5 Ky. Law Rep., 178; Brock v. Com,, 92 Ky., 183.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—AFFIRMING.

Whilst the appellee, W. T. McCullough, was driving along a public highway leading from the city of Covington on the 29th of August, 1901, with two companions, he met the appellant, Clifford Shinkle, riding in an automobile. Appellee's horse became frightened at the automobile, and upset his vehicle, throwing him upon the turnpike road, inflicting injuries to his clothing and person, and permanently impair-

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ing the vision in one eye. For these alleged injuries he instituted this action for damages, and alleged that the defendant, while in sight and approaching him, had recklessly and negligently propelled his automobile at a rapid and dangerous rate of speed up to and within twenty-five feet of his horse, notwithstanding the fact that he saw or could have seen, that plaintiff's horse had become frightened, and in disregard of repeated warnings to slacken his speed, and that by reason of defendant's refusal to heed these warnings his horse became frightened, and, in his efforts to escape, turned over his buggy, inflicting the injuries complained of. The defendant, in his answer, denied all the allegations of negligence recited in the petition, and pleaded contributory negligence. Upon the trial of the case before a jury, the testimony introduced by the plaintiff was to the effect that the defendant was traveling at a very high rate of speed (some of the witnesses put it at as high as twenty miles an hour); that the motive power was gasoline mixed with air, which made a noise, when the machine was in operation, which could be heard at a distance of about 200 feet; that as soon as the plaintiff's horse heard this noise it began to take fright, and plaintiff and those with him at once began to shout and signal to the defendant to slacken his speed, but that he failed and refused to do so until he had driven the automobile to within thirty or forty feet of plaintiff, by which time his horse became so unmanageable as to upset the buggy; that the defendant saw that the horse was frightened, and the plaintiff's peril. The testimony on the other hand was that the defendant saw the plaintiff for about 200 feet driving along, apparently paying no attention to the approach of the automobile, the horse being apparently perfectly quiet; that, when he got within about 100 feet of the plaintiff, the horse suddenly shied, upsetting the buggy in the middle of the road; and

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that the defendant immediately slowed down his automobile, alighted therefrom, and went to assist the plaintiff. He also testified that the customary signal to slacken speed, by holding up the hand, was not given, and that as soon as he discovered the peril of plaintiff he stopped his machine, and that he was not going at exceeding six or seven miles an hour. The trial resulted in a verdict and judgment for the plaintiff for $1,020, and the defendant has appealed. He asks a reversal, first, for alleged errors in the second instruction, and also in the instruction defining the measure of damages.

Instruction No. 2 is as follows: "If the jury believe from all the evidence that, at the time and place of injury to plaintiff, the defendant was operating said automobile at a high rate of speed, and that because of said rate of speed, or because of said rate of speed together with the noise emanating from said automobile, the horse of plaintiff became frightened, and caused the injury to plaintiff, and if the jury further believe that the act of defendant in operating said automobile at a high rate of speed, if he did so operate it, was an act of negligence on the part of the defendant, the jury should find a verdict for the plaintiff." The complaint of this instruction is that it authorized the jury to find for the plaintiff if they believed that his horse became frightened either at the speed of the automobile, or at the speed and noise emanating therefrom; it being nowhere alleged in the pleadings that the horse was frightened by any noise. This instruction only authorized a recovery in the event the jury found from the evidence that the automobile had been operated at a high rate of speed, although the horse may have been alarmed not only by the high rate of speed at which the machine approached, but also at the noise emanating therefrom. Besides, appellant himself testified that the op-

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eration of the machine was always accompanied by noise, and upon cross-examination the witness Hanauer testified to the same effect; and the only noise spoken of in the instruction was that which was incident to the running of the automobile. The error in the instruction, if it was in fact an error, was not, in our opininon, prejudicial to the defendant.

The instruction defining the measure of damage is not objectionable. In fact, it has been approved by this court in substantially the form in which it was given in this case in numerous cases.

Appellant also complains that the trial court erred in permitting appellee to prove a statement alleged to have been made by him upon the trial in a justice's court in an action on account for repairs to the buggy injured in this accident, to the effect that he considered himself responsible for the accident. To support this contention, we are referred to the note to section 44 of 1 Greenleaf on Evidence, in which the editor says that: "Opinion evidence of this character is only allowed when from the nature of the case the facts can not be stated or described to the jury in such manner as to enable them to form an accurate judgment thereof, and no better evidence than such opinion is attainable." The author, in the section referred to, was discussing the competency of expert testimony. We think this testimony was competent as an admission of defendant, because it tended to contradict the testimony of the defendant given upon the trial of the case to the effect that he had not been guilty of any negligence which superinduced the accident complained of.

While automobiles are a lawful means of conveyance, and have equal rights upon the public roads with horses and carriages, their use should be accompanied with that degree of

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prudence in management, and consideration for the rights of others, which is consistent with their safety. If, as the jury found by their verdict, appellant knew, or could have known by the exercise of ordinary care, that the machine in his possession and under his control had so far excited appellee's horse as to render him dangerous and unmanageable, it was his duty to have stopped his automobile, and taken such other steps for appellee's safety as ordinary prudence might suggest.

Appellant also complains that the verdict is excessive. The testimony shows, that, in addition to the mere superficial bruises received by appellant, there has been a permanent and serious loss in the vision of one of his eyes, as the result of a severe cut and bruise immediately over it, received at the time of the accident. It is impossible for us to determine the extent of pecuniary loss which may accrue to appellee from an injury of this character, not to speak of the pain and suffering and inconvenience resulting therefrom. This was a question for the jury, and there was abundant testimony on this point to support their finding.

For reasons indicated, the judgment is affirmed.

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CASE 104—ACTION BY THE UNITED STATES SAVINGS & LOAN COMPANY AGAINST GEORGE GRAY ON NOTES, AND TO ENFORCE MORTGAGE LIEN.—DEC. 3.

Gray v. United States Savings & Loan Co.

116 967
130 402

APPEAL FROM CLARK CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

BUILDING AND LOAN ASSOCIATIONS—COMPROMISE WITH BORROWING MEMBER—PLEADINGS—ADMISSIONS—DENIALS.

Held: 1. In the absence of a rejoinder, all the well-pleaded facts in the reply are taken as true, and, in the absence of evidence, the allegations in the answer which are denied by the reply are taken as untrue.

2. A contract between a Minnesota building association and a borrowing member by which they settled the matter of usury contained in the debt, and agreed on the amount due, was valid, where the association in good faith claimed that the debt was not tainted with usury under the laws of Minnesota, which should govern, and several circuit courts of Kentucky had so decided, and where the borrowing member contended that the debt was tainted with usury, and was about to prosecute an appeal to the Court of Appeals for the determination by that court of that question, and which that court subsequently settled against the contention of the association.

D. L. PENDLETON AND HAZELRIGG & CHENAULT, FOR APPELLANT.

BECKNER & JOUETT, FOR APPELLEE.
(No briefs in the record.)

OPINION OF THE COURT BY JUDGE BARKER—AFFIRMING.

In the year 1894, the appellee, the United States Savings & Loan Company, which was a going concern, with its head office at St. Paul, Minn., instituted an action against appellant to recover judgment against him on two notes—one for $500, and the other for $400—and to enforce a

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mortgage lien by which their payment was secured. On the 24th day of May, 1894, a judgment was entered as prayed for in the petition. The judgment rendered, with the accrued interest and costs, amounted, in round numbers, to $1,300. Appellant, although summoned, made no defense to this action, but on the contrary, his counsel consented that it should be entered. Afterwards, on the 27th day of August, 1894, he entered into an agreement with appellee, by which, in discharge of the judgment against him, he executed and delivered to it his note, with Betty Gray as surety, for $1,050, payable on or before June 1, 1895; and, to secure its payment, they executed a mortgage on property belonging to them in Winchester, Ky. There were, after this compromise was made, a number of payments, the aggregate amount of which is in dispute, but which appellee admits to have been as much as $271.50. Appellant failed to pay any further upon his note, and this action was instituted by appellee to recover judgment for the balance due thereon, and to enforce the mortgage lien given to secure it. To this action appellant filed an answer, alleging much larger payments on the note than the amount of the credits given in the petition, and that the claim against him contained a large amount of usury, and also charging fraud and covin in the obtention of the original judgment against him, and in the compromise by which he executed and delivered his note for $1,050 in its discharge. To this answer appellee filed a reply, controverting all of its material allegations of fact inconsistent with those of the petition, and then affirmatively setting forth the following state of facts: That, after the rendition of the original judgment against appellant, he was about to prosecute an appeal therefrom to the Court of Appeals, contending that the judgment against him embraced a large amount of usury; that at that time appellee contended that

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it was a Minnesota corporation, and that its contract with appellant was a Minnesota contract; that, under and by virtue of the laws of Minnesota, it was valid and binding, and that the amount adjudged in its favor against appellant was properly recoverable under the contract, as construed and enforced by the laws of the State of Minnesota; that the question of the validity of this contract had not at that time been decided by this court, but, on the contrary, had been decided by the circuit court of Clark county, and various other circuit courts throughout the State of Kentucky, to be a Minnesota contract, and enforceable as such here; that this controversy between appellant and appellee was bona fide, and involved the question of whether or not the judgment in favor of appellee contained usury; that, with this condition of affairs existing, appellee and appellant, in person, and with the aid and guidance of his attorney, Rodney Haggard, an able and efficient counselor, in good faith, and for the purpose of settling and adjusting the differences between the parties, entered into the contract by which the note sued on was executed and delivered by appellant to appellee; that this contract of settlement and compromise was made in the office of Rodney Haggard, appellant's counsel, with his aid, assistance, and advice, both he and appellant being present at the time; that all of its terms were fully understood, approved and urged by appellant in person and by his counsel; that it was made and accepted in good faith by appellee, who at once stopped the sale of the property which was advertised for that day, and thereafter, in good faith, abandoned and released all claims of any sort under the judgment. No rejoinder was made to this pleading, and no proof adduced by the appellant to establish the allegations of payment and fraud, which were placed in issue by the denials of the re-

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ply. The case being submitted on the pleadings, a judgment was rendered as prayed for in the petition.

In the absence of a rejoinder, all of the well-pleaded allegations of fact in the reply are to be taken as true; and, in the absence of evidence to support them, all of the allegations of payment and fraud in the answer which were controverted by the reply must be taken as untrue. The question, then, for adjudication, is whether or not the compromise made between the parties litigant, as set forth in the reply, can be upheld. There is a wide difference between a compromise by which a debtor agrees to pay in settlement of his debt a less amount of usury than that claimed by the creditor, where there is no dispute between the parties as to the usurious character of their contract, and a compromise by a debtor of a contract which he claims contains usury, but the usurious nature of which the creditor in good faith disputes.

The crucial question in such matters is always whether there is in good faith a controversy between the parties. The line between these two classes of cases sometimes becomes exceedingly fine, but it is none the less real for that reason. In the case of Taylor v. Patrick, 1 Bibb, 168, it is said: "The compromise of a doubtful right is a good consideration to found a contract on, and it is immaterial on whose side the right ultimately turns out to be, as it must be on one side or the other, because there can be but one good right to the same piece of property." In the case of Fisher v. May's Heirs, 2 Bibb, 448, 5 Am. Dec., 626, in which one party undertook to dispute and uproot a settlement made with the other, for reasons set forth, the court said: "This is certainly no ground for relief. There can be but one superior and equitable right. If, therefore, the solemn compromise of the parties about property of doubtful title is made to depend on the question whether the parties have so settled their dis-

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pute as the law would have done, then it may be truly said that a compromise is an unavailing and idle act, which questions even the power of the parties to bind themselves." In the case of Creutz v. Heil, 89 Ky., 429, 11 R., 652, 12 S. W., 926, the following admirable rule governing the question under discussion was laid down: "It seems that the inquiry is whether the party relying on the agreement had reasonable and proper cause for believing that the question was doubtful, and that the right might ultimately prove to be with him. In other words, it is sufficient that there was an honest claim on his part, asserted without fraud, and that there was a real ground for dispute. If the point is so clear that it can only be answered in one way, the compromise would be invalid, as wanting a consideration to uphold it. The adequacy of the consideration can not be inquired into, but the want of any consideration whatever may be inquired into. The verdict of a jury or the decision of a court depends in a greater or less degree upon the human understanding as to what is right and equitable in a given state of case; but when the given state of case has received such judicial interpretation as to admit of no question, supposing that the judicial mind will continue to run in the same channel (and such supposition should always be indulged in), then there can arise, in a legal and equitable sense, no consideration for a compromise of such matter. It is only in reference to such matters as counsel learned in the law or courts might differ, although the right ultimately turns out to be wholly on one side, that constitutes a valid consideration for compromising such matters. The question of such consideration can not be measured; hence its adequacy will not be inquired into."

The admitted facts show that, at the time the compromise under consideration was entered into, there was a bona fide

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controversy between the parties litigant; that at that time the contract between them had been upheld by the circuit court in which it was then depending as valid and binding; that the other circuit courts had so held, and this court at that time had made no ruling adverse to that position. It may be said, therefore, that there was a real controversy between the parties, the ultimate outcome of which, if carried to this court, could not then be known. This was evidently believed by the counsel for appellant, who was a man of high rank and standing in his profession, or he would not have advised his client to make the compromise. These is no more reason why a contract as to the usurious nature of which there is a genuine dispute should not be compromised, than if it related to any other question of disputed legal right. In the case of Cynthiana Loan & Building Association v. Florence (107 Ky., 636; 21 R., 1403); 55 S. W., 207, where there was a dispute between the borrowing member and the corporation, and they had settled and adjusted their differences, the court, in upholding the settlement, said: "The parties, to avoid litigation, had a clear right to agree on what this amount was; and a compromise of such matter, if made, as alleged in the answer, fairly, deliberately, and with the advice of counsel, can not be disregarded. By the arrangement appellees not only had their note canceled and the mortgage on the land released, but got rid of all liability as stockholders in the association, and terminated all connection with it, or liability to it or to its creditors thereafter. The law delights to uphold compromises, because they keep down strife and prevent litigation. The reasons which allow usury paid upon a compromise to be recovered have no application to a compromise, made in good faith, of other matters not tainted with usury, and for which a legal liability existed." In the case of United States Building & Loan Association v. Denny,

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(23 R., 2109), 66 S. W., 662, it was said: "The court is of the opinion that the contract between the association and its borrowing member, by which they settled the matter of usury contained in its debt against him, and in which they agreed upon the price to be paid by the association for appellee's stock in it, and allowed as a credit upon the debt, was a meeting of the minds of the parties competent to contract about those matters. The controversy existing between them, and the problematical value of the stock, were sufficient consideration to support the agreement. It was a contract in every essential. It was such a contract that had the value of the stock of appellee been greater than was allowed in his settlement, he would have been compelled to accept the settlement, and to have specifically performed it." In the case of Latham v. Glasscock, 10 Ky. Law Rep., 77, in an opinion by the superior court, it was said: "As the issue was made as to the usury in the note sued on, and the parties, after the issues were joined, compromised the matters involved in the action, whereby it was agreed that the judgment should be rendered for plaintiff for a certain amount which was considerably less than the amount claimed, and the judgment was so entered, this judgment as effectually disposed of the question of usury as if the court had, upon the trial of the issues joined, rendered judgment for the same amount." The case of Cynthiana Building & Savings Association v. Ecklar (23 R., 1467), 65 S. W., 335, is not inconsistent with the cases here cited. In that case there was no dispute on the question of usury. It was a mere compromise, which had the effect of causing the creditors to remit a part of the usury, and the debtor agreeing to pay the balance, together with the principal debt. There is no magic in the word "usury" which forbids a question as to its existence being settled between the parties, the same as any other dis-

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puted and doubtful claim. In the case at bar, at the time the compromise was made, it was doubtful as to what would be the ultimate outcome of the claim on the part of the corporation that its contract was a Minnesota contract, valid and binding by the laws of that State, and which should be valid and binding here.

This court had made no ruling upon that question, and at that time the judicial utterance of the circuit court was in favor of the contention of appellee. Subsequently this court has settled the question adversely to the contention of appellee, but this does not render nugatory the settlement between the parties. There is no more reason now to upset the settlement, in favor of appellant, because this court has finally decided adversely to the claim of the appellee, than there would have been to upset it in favor of the appellee, so as to permit it to collect the full amount of the judgment originally rendered, if this court had adjudged the contract to have been a Minnesota contract, enforceable by the laws of this State. As has been well said, it does not matter upon which side the right ultimately appears to have been, if at the time the settlement was made there was a bona fide controversy between the parties, about which lawyers and courts might differ.

For these reasons, the judgment of the circuit court is affirmed.

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CASE 105—ACTION BY NORA MALONE'S COMMITTEE AGAINST LEWIS LEBUS TO RECOVER AN ANNUITY IN LAND CLAIMED TO BE DUE HIS WARD.—DEC. 4.

Malone's Committee v. Lebus.

APPEAL FROM HARRISON CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

GIFTS—DELIVERY—ACCEPTANCE—VENDOR AND PURCHASER—RECORDED LIENS.

Held: 1. Where a deed recited that part of the consideration was a note, with interest payable annually, for the use of a certain person, during her life, there was a valid gift of the interest, though the note was not delivered to the donee.

2. Where the donee of a gift *inter vivos* is of unsound mind, the law will presume an acceptance.

3. Where a recorded deed showed that part of the consideration was a note, the interest on which was payable for the use of a certain person during her life, and a lien was reserved as security for the note, a subsequent purchaser was bound in the same manner as the first purchaser.

D. BRADLEY SHAWHAN, ATTORNEY FOR APPELLANT.

On April 30, 1872, Caleb Jones, an uncle of the ward of appellant, Nora Malone, in order to secure her an annuity for life, did, by a deed of conveyance of a small lot in Cynthiana, Kentucky, reserve to her such an annuity of eighteen dollars, payable as the interest on the balance of purchase money unpaid which interest by the terms of the deed was made payable for the first time on June 1, 1873, and on said date annually thereafter.

By a series of subsequent conveyances, the appellee, Lewis Lebus, became the purchaser of said lot, none of the interest and no part of this annuity has ever been paid, the beneficiary being still alive, the principal is not due. Nora Malone, the beneficiary under said deed, was then and has ever since been a mute and wholly without mind, and has been so adjudged. These facts all having been set out in the petition, a demurrer was sustained thereto by the lower court from which ruling this appeal is prosecuted.

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We claim the court erred:

1. Because Nora Malone was *given* the property to which she asks the court to restore her.

3. She was deprived of it through no fault of hers, and evidence of it lost apparently through fraud of others.

3. Time can not run, so as to bar her right on account of the alleged continuing disabilitiy.

4. If time should run, it can only become operative as a bar to so much of it as was due more than fifteen years before action was instituted for its recovery.

5. Because it is an action to enforce performance of an undertaking in writing and as evidenced by deed of record and constituting notice to defendant, which he should be estopped to deny.

6. Because no part of the said interest has ever been paid her since said date, June 1, 1873.

7. Because note is not yet due, and she should be entitled to have her rights thereunder restored to her and secured by lien as originally contemplated.

AUTHORITIES CITED.

Civil Code, Ky., secs. 35, 98; Kentucky Statutes, secs. 2514, 2525; Jones on Liens, vol. 2, secs. 1094, 1098, 1083, 1084; Pomeroy's Equity Jurisprudence, vol. 1, sec. 112, vol. 2, secs, 591, 688, 692; Maupin Marketable Title to Real Estate, p. 240, sec. 104; Tiedeman on Real Property, sec. 271; Rankin v. Turney, 2 Bush, 555; Boar v. Jolly, 5 Bush, 86; Chiles v. Drake, 2 Met., 146; Davenport v. Prewitt's Admr., 9 B. Mon., 96; Mize v. Barnes, 78 Ky., 506; Powell's Admr., v. Minor and Dixon, 11 Ky. Law Rep., 286; Pritchard v. Warner's Assignee, 4 Ky. Law Rep., 349; Honores Exor. v. Bakewell, 6 B. Mon., 67; Tiernan v. Thurman, 14 B. Mon., 224; Pryse v. McGuire, 81 Ky., 608; Johnson v. Gwathmey, 4 Littell, 319; Thornton, etc. v. Knox's Exor., 6 B. Mon., 74; Woodward v. Woodward, etc., 7 B. Mon., 116; Cardova v. Hood, U. S. Supreme Court Reports, book 21, L. ed., foot p. 588.

LAFFERTY & KING, ATTORNEYS FOR APPELLEE.

1. The plaintiff sues on a note but didn't file it, and we claim it is shown to have been paid in the conveyance made July 1, 1873, by Caleb Jones' vendee, Whitaker to Curry, which deed shows it was a part of that consideration surrendered and cancelled; and when appellant filed that deed, he filed a receipt against the note.

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2. It is not shown that the note was ever delivered to her or to any one for her, nor was there any consideration for it.

3. When Jones surrendered the $300 land note signed by Whitaker, and it was cancelled, such delivery vitiated the lien, and when appellee examined the title to the property when he bought it in 1898, and found this old note was executed in 1872, cancelled in 1873, of record, he was secure against any lien for same upon the land.

4. The statute bars this note and if fraud existed as alleged, that plea can not now be raised after thirty years.

AUTHORITIES CITED.

Kentucky Statutes, sec. 2519; Lewis, &c. v. Carr, &c., 5 Ky. Law Rep., p. 429; Phillips, &c. v. Shipp, &c., 5 Ky. Law Rep., p. 460; Barclay, &c. v. Goodloe, Exor., 5 Ky. Law Rep., p. 936; Brown v. Brown, 12 Ky. Law Rep., p. 280; Dorsey, &c. v. Phillips, &c., 13 Ky. Law Rep., p. 405; King v. Graham, 13 Ky. Law Rep., p. 488; Kentucky Statutes, sec. 2358; Lawson v. Biller, 10 Ky. Law Rep., p. 80; Collins v. Shinkle, 11 Ky. Law Rep., p. 365; Wilson v. Scott, 11 Ky. Law Rep., p. 370, Wilson v. Scott, 13 Ky. Law Rep., p. 926.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

On the 30th day of April, 1872, Caleb Jones and wife conveyed by general warranty deed to Munroe D. Whitaker a small tract of land in the town of Cynthiana. The consideration therefor recited in the deed is as follows: "The said party of the first part for and in consideration of the sum of $350.00, of which $50.00 is in hand paid, and a promissory note for $300.00 with interest at six per cent. per annum, payable annually from the first day of June, 1872, for the use of Nora Malone during her life, and at her death to Caleb Jones, but should she die within four years from this date the principal is not to be paid until the end of that time." And a lien was reserved on the lot as security for the payment of the $300 note. On the 1st day of July, 1873, Munroe D. Whitaker and wife sold and conveyed this tract

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of land to James R. Curry by general warranty deed for the recited consideration of $50 cash, and the surrender of Whitaker's note to Caleb Jones for $300, dated June 1, 1872. On the same day Curry and wife sold and conveyed the land by general warranty deed to J. A. Fennell for the recited consideration of $350, $50 of which was paid in cash, and three notes, of $100 each, payable to Caleb Jones in one, two, and five years, respectively, with interest from date, executed for the remainder; a lien being reserved to secure the payment of the unpaid purchase money. On the 9th of March, 1887, N. B. Wilson, as executor of A. Fennell, and Mrs. Mary Fennell, sold and conveyed this tract of land to L. F. Struve for the recited consideration of $2,300, of which $1,150 was paid in cash, and for the balance of the purchase money a note was executed, due one day after date, and a lien retained to secure its payment. The deed contains no reference to the lien for $300 recited in the deed from Caleb Jones and wife to Munroe D. Whitaker. By a series of subsequent conveyances the appellee, Lewis Lebus, became the purchaser of this tract of land. On the 12th of July 1902, the appellant, P. P. Wyles, as committee for Nora Malone, brought this action in the Harrison circuit court, in which he alleged that Nora Malone had been from her birth a deaf mute, wholly without mind, dependant upon the charity of her uncle Caleb Jones for her support and maintenance; that on the 17th day of August, 1898, she had been adjudged by the Harrison county court, on the verdict of a jury, to be an imbecile and of unsound mind; and that he had been duly appointed her committee, and accepted the trust. He also set out the various conveyances of the lot conveyed by Caleb Jones and wife to Whitaker in April, 1872, and alleged that none of the installments of interest on the $300 note for which a lien was reserved in the conveyance of Jones and wife to Whitaker had been

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paid to Nora, or to any one for her use and benefit, and prayed that the deed to the appellee, Lewis Lebus, the last vendee of the tract of land, should be corrected so as to set out the reservation in her favor contained in the deed from Jones to Whitaker, and for a judgment for $18, the interest as of the 1st day of June, of each year from 1873 to 1902, inclusive, with interest from their respective dates until paid. The defendant, Lebus, filed a general demurrer to the original and amended petitions, which was sustained, and plaintiff's petition dismissed, and he has appealed.

It is contended for appellee that as plaintiff failed to allege that the $300 note was delivered to Nora Malone, or to any one for her use and benefit, or that Caleb Jones himself held it for her benefit, it was not a valid or enforceable gift, and that when the donor, Jones, surrendered this note, and accepted in lieu thereof three notes, of $100 each, in which no interest was reserved for Nora Malone, all claim for interest on the $300 note which she might have had terminated. It is also contended that the plaintiff's claim, if it ever existed, is barred by the lapse of time and the statute of limitations.

To constitute a valid gift inter vivos of personal property, the gift must be voluntary, gratuitous, and absolute, and take effect at once, and ordinarily must be accompanied by a delivery of the thing to the donee, or to some one for her use and benefit. But this is not always required. As said by this court in Williamson v. Yeager, 91 Ky., 286, 13 R., 273, 15 S. W., 661, 34 Am. St. Rep., 184: "If one delivers possession of personal property to a trustee to hold as a gift for the donee, it is a valid gift; and if he expressly says, or does acts amounting to the same thing, that he constitutes himself a trustee to hold the property for the donee, we perceive no reason why this should not be as valid and binding as a delivery

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of the property to a third person to be held for the donee." And in Krankel's Executrix v. Krankel's Executor, etc., 104 Ky., 745; 20 R., 901; 47 S. W., 1084, it was said: "The general doctrine is well settled that a completed parol voluntary trust is enforceable, and, in order to render such a trust valid and enforceable, the donor need not use any technical words or language in express terms creating or declaring the trust, but must employ language which shows an unequivocal intention on his part to create or declare a trust in himself for the donor." The reservation in the deed from Jones to Whitaker of the interest on the $300 note for the use of Nora Malone during her life is unequivocal, and sufficiently explicit to create a valid gift thereof to the beneficiary, Nora Malone; and, having been once made, it was beyond the power of Jones to thereafter revoke it without the consent of the donee. The note was not by its express terms to mature during the life of Nora Malone, and at her death it provided that the principal was to be paid to the donor. It was therefore natural and proper that he should have retained its possession. Besides, if as alleged, Nora Malone was an imbecile or a person of unsound mind at the date of the gift, no acceptance thereof by her was essential to render it valid, as the law will presume an acceptance on her part. See Pennington v. Lawson (23 R., 1340), 65 S. W., 120, and Bunnell v. Bunnell (23 R., 800-1101), 64 S. W., 420. A purchaser of real property must look to the records for evidence of title, and when it is there shown to be incumbered with liens in favor of a third person, he is presumed to have purchased with such knowledge and subject to such conditions, and himself becomes a trustee for the beneficiary with respect to the property, and is bound in the same manner as the original trustee from whom he purchased. See Jones on Liens, secs. 1083, 1084, 2 Pomeroy's Eq. Jur., sections 581, 688; and

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Johnston v. Gwathmey, 14 Ky., 317, 14 Am. Dec., 135. Nor is appellee's contention that appellant's claim is stale and barred by the statute of limitations maintainable—at least in so far as her claim to the annually accruing interest is not within the statute.

For reasons indicated, the judgment is reversed and cause remanded, with instructions to overrule the demurrer, and for further proceedings consistent with this opinion.

Petition for rehearing by appellee overruled.

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INDEX.

ACCESSORIES—

See Marriage, 1, 2, 3.

ADMINISTRATORS—

1. Suit to Settle Estate—Sale of Lands—Alienation—Lis Pendens—Laches—Claims of Creditors.—Kentucky Statutes (1899), section 2087, provides: "When the heir or devisee shall alien, before suit is brought (on the ancestor's or testator's debt), the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation, to the creditors of the decedent or testator; but the estate so alien shall not be liable to the creditors in the hands of a bona fide purchaser for a valuable consideration, unless action is instituted within six months after the estate is devised or descended, to subject same." HELD, not intended to create a lis pendens lien on the lands descended or devised, for the payment of the ancestor's debts, for a longer period than for six months after an action might have been begun to settle the estate and subject the land. Kelly v. Culver's Admr.....241
2. Party to Action.—Civil Code Practice, section 432, provides: "A creditor appearing before the commissioner (to audit claims) and presenting his claim becomes thereby a party to the action (for settlement of the estate) and is concluded by the final judgment of the court allowing or rejecting his claim." HELD, whether a creditor of the estate filing his claim was made a party to the petition in the settlement suit, or not, could not affect the validity of the lis pendens. Kelly v. Culver's Admr. 241
3. Diligence.—To obtain the benefits of a lis pendens, the party asserting it must have not only a suit in which relief *in rem* is sought against specific property sufficiently identified by the record, to which the other claimant or title holder must be a party in fact, but he must prosecute his suit with reasonable diligence. *Idem*.....241
4. Purchaser.—Where, after the expiration of the six months mentioned in Kentucky Statutes (1899), section 2087, one becomes a purchaser in good faith and for value, it does not matter how much he knows about who were the creditors of decedent, as nothing but a valid lis pendens can then affect the land as a lien. *Idem*. 241

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ADMINISTRATORS—Continued.

5. Creditors.—Certain creditors of an estate were, as such, named and joined in a suit to settle the same by the administrator thereof, and were thereby, as well as by the advertisement of the commissioner to whom reference was had to audit claims, called on to file their claims, if they desired to avail themselves of the benefit of the action. They failed to file their claims, without excuse or explanation, till after the commissioner had reported all claims ascertainable, and till after two judgments of sale of land had been rendered in the action, and the last sale to pay debts of decedents and the costs of the suit and of administration had been confirmed. Two years after they should have set up their claims, they sought to enforce them against the residue of the land sold by the heirs to an innocent purchaser for value, after deducting what was necessary to discharge the known liabilities of the estate. HELD, that they were guilty of laches precluding their recovery. *Idem.* 241

6. Land—Lease by Administrator—Rents—Rights of Heirs.—Rent accruing after intestate's death under a lease of his real estate by the administrator, under order of court to raise funds necessary to pay debts, belongs to the heirs and not to the administrator, though the administrator could have sold the land to pay the debts. Vance, &c. v. Vance's Admr., &c.....520

ADMIRALTY—

1. Vessels—Barges—Mortgages—Record—Notice—Where the home port of a vessel was Evansville, Ind., the recording of a mortgage thereon in the office of a county clerk in Kentucky was ineffectual to impart constructive notice thereof to creditors of the owner of the vessel, under Revised Statutes of the United States, section 4141 [U. S. Comp. St., 1901, p. 2808], requiring all vessels to be registered at the nearest port to which the owner resides, and section 4192 [U. S. Comp. St., 1901, p. 2837], providing that no bill of sale or mortgage thereon shall be valid unless recorded in the office of the collector of customs where such vessel is registered. Arnold, &c. v. Eastin's Trustee, &c. 686

2. Antecedent Creditors.—Where a mortgage on a vessel was invalid as to creditors for failure to record the same in the surveyor's office of the home port as required by the Revised Statutes of United States, sections 4141, 4192 [U. S. Comp. St., 1901, pp. 2808, 2837], the subsequent recording of the mortgage in such office was ineffectual as to antecedent creditors. *Idem*...686

3. Barges are Vessels.—Under Revised Statutes of United States,

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ADMIRALTY—Continued.

section 3 [U. S. Comp. St., 1901, p. 4], providing that the word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water, barges used for the transporation of coal on an inland river were "vessels," within Revised Statutes, sections 4141, 4192 [U. S. Comp. St., 1901, pp. 2808, 2837], providing for the registration thereof, and requiring bills of sale and mortgages thereon to be recorded in the office of the surveyor at the home port. *Idem*. 686

4. Defrauding Creditors.—Evidence reviewed, and HELD to support a finding that a bill of sale of a vessel and barges from an insolvent to a creditor was made with intent to defraud creditors. *Idem*. 686

5. Bankruptcy — Fraudulent Conveyances. — Under Bankruptcy Act, July 1, 1898, chapter 541, sections 70a, 67e, 30 Statutes, 565, 564 [U. S. Comp. St., 1901, pp. 3451, 3449], providing that the property of a bankrupt shall be vested in the trustee by operation of law from the date of the adjudication, and authorizing the trustee to attack conveyances of the bankrupt's property made within four months prior to the filing of the petition, with intent on the part of the bankrupt to defraud his creditors, where a fraudulent bill of sale executed by a bankrupt was not recorded so as to be valid against his creditors until within four months prior to his adjudication as a bankrupt, the trustee was entitled to invalidate the same, though the bill was executed more than four months prior to the filing of the bankruptcy petition. *Idem*....686

6. Void Sales—Liens.—Where, after the execution of a fraudulent bill of sale of certain vessels, the buyer paid various claims which were liens thereon, and after the sale had been adjudged void at the instance of the seller's trustee in bankruptcy the buyer voluntarily surrendered the vessel to the trustee, the court had no further jurisdiction to require the trustee to reimburse the buyer to the amount of the liens so paid as a condition to decreeing a delivery to the trustee. *Idem*....686

7. Maritime Jurisdiction.—A contract to furnish material for the construction of a dock, reserving a lien thereon to the seller, is not a matter of maritime jurisdiction, within the exclusive cognizance of the Federal court. *Idem*....686

8. Docks—Chattels.—Where a contract to furnish materials for the construction of a dock, reserving a lien thereon to the seller, was made in Indiana, and at that time the dock was a mere chattel within that State, the right of the seller to enforce such lien on the dock, which was subsequently placed

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ADMIRALTY—Continued.

in the Ohio river, and within the jurisdiction of the Kentucky courts, must be determined by the laws of Indiana. *Idem.* 686

9. Recording Mortgages.—Under Burns' Revised Statutes of Indiana, 1901, section 6638, providing that no mortgage of goods shall be valid against third persons unless recorded in the recorder's office of the county where the mortgagor resides within ten days after execution thereof, a mortgage made in Indiana, not so filed and recorded, is void as against creditors of the mortgagor. *Idem.* 686

ALIENATION—

See Admrs., 1.

ALTERNATIVE ALLEGATIONS—

See Master, &c., 7.

APPEALS TO COURT OF APPEALS—

1. Jurisdiction—Amount in Controversy.—Plaintiff alleged that he was entitled to eighty dollars of the proceeds of a crop of tobacco sold by one of defendants, but that the other defendant claimed a lien on plaintiff's portion. The first defendant admitted plaintiff to be entitled to eighty dollars, but the other defendant answered, alleging, among other things, that plaintiff's share amounted to $225. To this answer plaintiff and the former defendant demurred, and the demurrer was sustained, and judgment given for plaintiff for eighty dollars. HELD, that the demurrers having admitted the allegation of the answer, the "amount in controversy" was more than $200, and hence authorized an appeal. Richart v. Goodpastor, &c.....637

ASSIGNMENT FOR CREDITORS—

1. Action by Assignee—National Bankruptcy Act.—(1) Kentucky Statutes, 1899, section 84, provides that if an assignor for the benefit of creditors, before making the deed, shall have made a preferential or fraudulent transfer of any of his property, it shall vest in the assignee, who shall have the remedies of a creditor. Act 1856 (Kentucky Statutes, 1899, section 1910) enacts that every sale made by a debtor in contemplation of insolvency, and with a design to prefer one creditor, shall operate as an assignment for the benefit of his creditors; and by section 1911 such transfers are subject to the control of equity on petition of any one interested. The national bankruptcy act makes it an act of bankruptcy for a debtor to make an assignment for the benefit of his creditors, or to prefer one creditor over another. HELD, that the fact that when an insolvent made

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ASSIGNMENT FOR CREDITORS—Continued.

a conveyance of real estate and when he subsequently made an assignment for the benefit of creditors the national bankruptcy act was in force did not preclude the assignee from suing to bring the property conveyed into the trust fund, the act of 1856 not being an insolvency act which could be superseded by the bankruptcy act and the transaction being within the jurisdiction of the State courts under its statutes until attacked in the Federal courts as an act of bankruptcy. Downer, &c. v. Porter, &c. 422

2. Limitation—"Delivery of the property"—Attornment.—Kentucky Statutes, 1899, section 1911, makes a transfer by a debtor in contemplation of insolvency subject to the control of equity on a petition of any one interested who files a petition within six months after the delivery of the property. HELD, that "delivery of the property" means a visible change of possesions, and, where a house was conveyed, the mere fact that the tenant therein attorned to the grantee, and thereafter paid her rent, did not constitute a delivery sufficient to set the statute in motion. *Idem*.....422

3. Attorney and Client—Notice to Attorney.—Where the attorneys for an insolvent learned from him that he had conveyed certain land, and subsequently they were employed by the insolvent's assignee for the benefit of creditors, their knowledge of the deed was not chargeable to the assignee. *Idem*.....422

ATTACHMENTS—

See Non-Residents, 9, 10.

ATTORNEY & CLIENT—

See Assignment for Creditors.

ATTORNEY'S FEES. (See Corporations, 6.)

1. Employment by Insurance Commissioner—Claim against Treasury—Duty of Attorney General.—Kentucky Statutes, 1899, section 762, authorizing the Governor to allow a reasonable compensation to attorneys of the insurance department for services rendered in enforcing laws relating to insurance companies, provided that, in cases tried by any court, such compensation shall be adjudged by the court, should be construed in connection with such previous sections, and hence did not justify an allowance for services of attorneys other than the attorney general who represented the State in the court of appeals in the successful prosecution of an insurance agent for soliciting insurance without a license from the insurance commissioner. Sims v. Commonwealth.....1

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AUTOMOBILES—

1. Excessive Speed—Frightening Horse—Instructions.—In an action for injuries sustained by plaintiff by his horse having been frightened by defendant's automobile, which it was alleged was running at an excessive speed, defendant and another witness testified that the operation of the machine was always accompanied by noise. The court instructed that if defendant was operating the automobile at a high rate of speed, and because thereof, or because of such speed together with the noise, the horse became frightened, and defendant's conduct in operating the automobile at such speed was negligence, plaintiff was entitled to recover. HELD, that if there was any error in the instruction, in that it authorized the jury to find for plaintiff if they believed the horse became frightened either at the speed or the noise, while fright by the noise was not pleaded, it was not prejudicial. Shinkle v. McCullough.....960
2. Injury to Plaintiff—Evidence—Statement of Defendant in Justice's Court.—In an action for injuries sustained by plaintiff because of his horse having been frightened by defendant's automobile, which was running at an excessive speed, evidence of a statement alleged to have been made by defendant on the trial in justice's court in an action for repairs to the buggy injured in the accident complained of, to the effect that he considered himself responsible for the accident, was admissible as tending to contradict defendant's testimony on the trial to the effect that he had not been guilty of negligence. *Idem*.....960
3. Negligence of Defendant.—Where one operating an automobile on a public highway knew, or by the exercise of ordinary care could have known, that the machine had so far excited a horse as to render him unmanageable, it was his duty to stop and take steps such as prudence might suggest. *Idem*.....960
4. Excessive Verdict.—Where, in an action for injuries sustained by plaintiff by his horse having been frightened by defendant's automobile, the testimony showed that, in addition to superficial bruises, the vision of one of plaintiff's eyes had been permanently and seriously impaired, a verdict for $1,020 was not excessive. *Idem* 960

BAIL BOND—

1. Felony—Taken by Sheriff—Defendant not before Magistrate—Validity of Bond.—Under Criminal Code, section 27, providing that a magistrate in issuing a warrant of arrest shall describe the offense, and direct the officer to bring the person before a magistrate, to be dealt with according to the law; and section 28, declaring that if the offense be a misdemeanor,

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BAIL BOND—Continued.

the magistrate issuing the warrant shall indorse thereon the amount of bail; and section 29, providing that if defendant give bail "as provided in the last section," the officer taking it shall fix the day of defendant's appearance; and section 33, providing that the officer who has executed the warrant of arrest shall make return on it, and deliver it to the magistrate before whom defendant is brought, or, if bail be given as provided by section 28, shall deliver the warrant and bail bond to the officer before whom defendant is bound by the bond to appear for an examination; and section 74, providing that before conviction defendant may be admitted to bail for his appearance before a magistrate for an examination if the offense be a misdemeanor, or for his appearance in court to which he is sent for trial—a person charged with a felony may not be admitted to bail before being brought before a magistrate, and, though the magistrate issuing the warrant charging a felony indorse bail on it, a bond accepted by the sheriff is void. Commonwealth v. Phillips.....329

2. Release of Surety—Waiver of Defects.—Where a surety acting under a power of attorney from his co-sureties executes a bail bond knowing that a co-surety had not properly executed the power, and that the official taking the bond had no knowledge of the defective power, the other sureties can not claim release from liability because such co-surety was not bound; since the bond having been executed by their representative with knowledge of the defective power, they waived any informality in the execution by the co-surety. Commonwealth v. Roark, &c..396

BANKS AND BANKING—

1. Peremptory Instruction.—The trial court's action in granting a peremptory instruction will be sustained if such instructions should have been given for any reason apparent from the record. Warren Dep. Bank v. Fidelity & Deposit Co. of Maryland.....38

2. Guaranty—Fidelity Bond—Application.—Where a bank seeks to avail itself of the benefit of the actions of its president in securing the execution of a bond guarantying the fidelity of its cashier, it must accept such actions subject to the president's representations inducing the execution of the contract by the surety. *Idem.* 38

3. Ratification.—A bank, in accepting its president's action in procuring a bond guarantying the fidelity of its cashier, must be held to have assented to the conditions of the bond providing that the representations made by the president relative to

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BANKS AND BANKING—Continued.

the duties and accounts of the cashier should constitute an essential part and form the basis of the contract. *Idem*.....38

4. False Representations.—Kentucky Statutes, 1899, section 639, providing that all statements or descriptions in an application for insurance shall be deemed representations, and not warranties, and shall not prevent a recovery on the policy unless fraudulent or material, does not alter the vitiating effect of a materially false representation. *Idem*.....38

5. Fraud.—Where representations in an application for an employe's fidelity bond are material and false, the bond was invalid, and whether they were fraudulent or not was immaterial. *Idem*. 38

6. Joint Deposit.—Where several persons make a deposit in a bank to their joint credit, the bank must have the signatures of all of them appended to a check before it is authorized to pay it. Columbia Finance & Trust Co. v. First Natl. Bank.....364

7. Firm Deposits.—Where moneys belonging to a firm are deposited in a bank, a member thereof can not employ any part of such funds to pay his debt to the bank without the consent of the remainder of the firm. *Idem*.....364

8. Trust Funds.—If a depositor of trust funds appropriates them to the payment of his individual debt to the bank, the latter, having notice of the character of the fund, is affected with knowledge of the misappropriation, and may be compelled to refund. *Idem*. 364

9. Assignment of Partnership Funds.—An assignment by a member of a firm, in payment of his personal debt, of a portion of a sum owing the firm, which is consented to by the other partner, is of as much validity as if the assignment had been made in the name of the firm. *Idem*.....364

10. Choses in Action.—As between successive assignees of the same chose in action, the order of time, rather than the order in which notice is given to the debtor, controls the preference. *Idem*. 364

11. Same.—Civil Code, section 19, provides that in the case of an assignment of a thing in action, the action by the assignee is without prejudice of any discount, set-off, or defense now allowed, and Kentucky Statutes, 1899, section 474, provides that on the assignment of a bond or bill for money the assignee's action is without prejudice to any defense the debtor had before notice. HELD, that an assignee's right of action on the assignment of a chose in action is without prejudice to any discount, &c., the debtor has, before notice of the assignment. *Idem*. 364

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BANKS AND BANKING—Continued.

12. Consent of Partners.—Where a member of a firm assigned his interest in a sum owing the firm, which assignment was consented to by the other member of the firm, though the assignment was partial, it being afterwards assented to by the debtor, and the debtor not complaining, the assignment would be protected in equity as against a subsequent assignee of the asme interest. *Idem.* 364
13. Notice.—The failure of an assignee of a chose in action to give notice to the debtor, having prejudiced no right, is immaterial in a suit wherein he seeks to enforce his assignment. *Idem.* 364
14. Unaccepted Check.—The fact that a bank, when a check was drawn on it, claimed not to have the money on hand, did not prevent the application of the rule that the holder of an unaccepted check may maintain an action thereon. *Idem*.....364
15. Attorney Assigning his Share of Feee.—One of a firm of attorneys borrowed money of a bank, assigning as security therefor his share of a fee owing the firm by A. Subsequently he assigned his share of such fee to a trust company, and the other partner assigned to the trust company, to secure a loan, his share of the same fee and his share in another fee owing the firm by B. Thereafter a sum of money, from which it was understood the fee owing by A. was to be paid, came into the hands of the bank. HELD, that the bank not being a creditor of the latter partner, the trust company could not be compelled to first exhaust the fund arising from the fee owing by B. *Idem.* 364

BANKRUPTCY. (See Assignment for Creditors, 3)

1. Discharge—Effect on Judgment for Slander.—The bankruptcy act of July 1, 1898, provides that a discharge in bankruptcy shall release a bankrupt from all provable debts excepting among others, judgments in actions for wilful and malicious injury to the person of another. HELD, that a slander is necessarily a wilful and malicious act, and a discharge in bankruptcy does not release the bankrupt from liability for such judgment. Sanderson v. Hunt.....435

BARGES—
See Admiralty, 3.

BILL OF EXCEPTIONS—
See Contracts, 6.

BILL OF PARTICULARS—
See R. R., 9.

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BIRTHS AND DEATHS—

See Physicians.

BOND FOR GOOD BEHAVIOR—

See Local Op., 1.

BUILDING AND LOAN ASSOCIATIONS—

1. Pleadings—Admissions—Denials—In the absence of a rejoinder all the well pleaded facts in the reply are taken as true, and in the absence of evidence the allegations of the answer which are denied by the reply are taken as untrue. Gray v. United States Savings & Loan Co.....967

2. Compromise with Borrowing Member—Usury—A contract between a Minnesota building association and a borrowing member, by which they settled the matter of usury contained in the debt, and agreed on the amount due, was valid, where the association, in good faith claimed that the debt was not tainted with usury under the laws of Minnesota, which should govern, and several circuit courts of Kentucky had so decided, and where the borrowing member contended that the debt was tainted with usury, and was about to prosecute an appeal to the court of appeals for the determination by that court of that question, and which that court subsequently settled against the contention of the association. *Idem.* 967

CHOSES IN ACTION—

See Banks, &c., 10, 11, 12, 13.

COMMISSIONER AND RECEIVER—

1. Deposits in Court—Failure of Court to Select Depository—Liability of Receiver.—Under Kentucky Statutes, section 411, providing that each circuit court may select by order a bank as a place of deposit for money paid into court, and that such bank shall execute bond, where the court has failed to select a depository the receiver or commissioner is liable only for negligence in the selection of a bank for the deposit of money paid into court, or in leaving the money there, and is not an insurer of the solvency of the bank selected by him. Johnson v. Fleming, Commissioner.....680

COMPROMISE—

See Building and Loan, 1, 2.

CONTRACTS—

1. Building Contract—Construction—Sureties on Bond.—Where sureties of a building contractor bound themselves that the contractor would furnish the material and erect the building "in

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CONTRACTS—Continued.

strict accordance with the plans and specifications furnished," and "in accordance with the terms and conditions of the contract," and the contractor failed to comply with the contract, the building was not completed, so as to release such sureties from liability. Mayes, &c. v. Lane, &c.....566

2. Bond—Compliance.—Where sureties of a building contractor bound themselves that the contractor would furnish the material and erect the building, and the contractor furnished the material and labor, but the owner was compelled to pay for a portion thereof, the bond was not complied with. *Idem*.....566

3. Material and Labor.—Where a building contract provided that eighty-five per cent. of the contract price should be paid during the progress of the work, and the balance on final completion, the owner of the building was not bound to see that such eighty-five per cent. was applied by the contractor to the discharge of his obligations for material and labor, as against the contractor's sureties. *Idem*.....566

4. Indemnity.—Where sureties of a building contractor agreed that the contractor would complete the building in strict conformity with the plans, etc., and would furnish all necessary material and labor, they were liable to indemnify the owner against claims for labor and materials furnished for the building for which the claimants were entitled to a lien thereon. *Idem*...566

5. Release of Sureties.—Where a building contract required the owner to pay eighty-five per cent. of the price as the work progressed, and the remaining fifteen per cent. on final completion, the sureties on the contractor's bond were not released by reason of the owner's payment of the fifteen per cent., before completion of the contract, in settlement of lien claims for material and labor, which operated to release the sureties' liability *pro tanto*. *Idem*.....566

6. Bill of Exceptions—Filing—Time.—Where an action was heard by the court, and it extended the time within which a bill of exceptions might be filed until the next term of court, the fact that thereafter the court held a special term did not affect the orders previously made, extending the time for filing the bill. *Idem*.....566

7. City—Contract for Heating Plant—Authority.—Where a city contracted, as it had authority to do, for a heating plant for a school house, no subsequent legislation removing such authority from the city could relieve it from liability on the contract. City of Ludlow v. Peck-Williamson Heating Co.....608

8. Warranty—Evidenced.—In an action for breach of contract to purchase a heating plant it was proper to refuse to admit evi-

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CONTRACTS—Continued.

dence as to whether the heating plant would have operated as it had been warranted to do. *Idem*.....608

9. Measure of Damages—Future Repairs.—Where the seller of a heating plant agreed to furnish repairs for castings for the furnace for a period of ten years in an action by him for damages because of the purchaser's failure to consummate the contract the measure of damages was not merely the difference between the contract price and what it would have cost plaintiff to have put in the plant, but there should have been deducted such sum as would be sufficient to furnish the repairs, such cost being neither vague nor speculative. *Idem*.....608

CORPORATIONS—

1. Stockholders—Double Liability.—Kentucky Statutes, 1899, section 547, provides that stockholders of corporations not "organized" for educational purposes, or for operating of water, gas, or electric plants, shall be individually responsible for their liabilities to the extent of the amount of their stock at par, in addition to the amount of such stock; and section 573 declares that after September 28, 1897, the provisions of the chapter containing the previous section shall apply to all corporations organized in the State, if such provisions would be applicable to them if organized under such chapter. HELD, that where a corporation previously organized for the purpose of "exploiting or promoting" the fire and police telegraph business and to purchase and otherwise acquire stocks, bonds, and other obligations of other corporations, etc., continued its business after section 573 went into effect, its stockholders were subject to the double liability prescribed by section 547. Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co., &c.....759

2. Enforcement—Sole Stockholders.—Under Civil Code, section 28, providing that the court may determine any controversy between parties before it, if it can do so without prejudice to others, it was not error to enforce a statutory double liability against a stockholder of an insolvent corporation without the other stockholders being made parties; the obligation of such stockholder being several, and not joint. *Idem*.....759

3. Same.—Where a corporation purchased all the stock of another corporation, the stockholders, of which were subject to the double liability prescribed by Kentucky Statutes, 1899, section 547, the fact that the purchasing corporation was the sole stockholder, and was itself a corporation, did not alter its double liability as such under the statute. *Idem*.....759

4. Counterclaim—Actions—Receiver.—Under Civil Code, section 96,

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CORPORATIONS—Continued.

defining a counterclaim, where plaintiff sued to have the affairs of certain corporations placed in the hands of a receiver, and part of the assets consisted of claims against plaintiff and other stockholders to enforce a statutory double liability, a pleading filed by such defendant corporations to enforce plaintiff's double liability constituted a proper counterclaim. *Idem*.759

5 Rights of Creditors—Numerous.—Where suit was brought for the liquidation of certain insolvent corporations, the creditors of which were numerous, and it was impracticable to bring them all before the court within a reasonable time, and a plaintiff procured an injunction restraining all such creditors from bringing or prosecuting any action on their claims except in such suit, and certain other creditors were permitted to prosecute and defend for all the other creditors, as authorized by Civil Code, section 25, it was proper for the court, in such action, to render judgment establishing all the claims of other creditors filed and allowed therein as against such corporations. *Idem*. 759

6. Attorney's Fees.—Where plaintiff in an action for the liquidation of certain corporations appeared by its own counsel, it could not object to an order allowing a certain per cent. of the amounts recovered by counsel for other creditors not represented by special counsel as attorney's fees. *Idem*.....759

COUNTIES—

1. Division into Justices' Districts—Unfair Apportionment—Effect—Taxation—Enjoining Levy.—The fact that the commissioners appointed to divide a county into justices' districts only allotted to a city in the county two magistrates, while five were allotted to the county outside of the city, notwithstanding that the city greatly exceeded the rest of the county in both wealth and population, was not ground for enjoining, at the suit of a private citizen resident in the city, a tax, levied by the fiscal court of the county, which is composed of the county judge and magistrates, where no exception was taken to the confirmation of the report of the commissioners, nor any attempt made to procure a reapportionment four years later, as authorized by Kentucky Statute, 1899, section 1082. McInerney, Sheriff v. Huelefeld. 28

2. Necessity for Levy.—So long as municipal governments make levies of taxes within the limits prescribed by the Constitution, courts of equity will not inquire into the necessity of the levy at the suit of an individual taxpayer. *Idem*.....28

3. Purposes of Levy—Order Reciting.—The resolution of the fis-

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COUNTIES—Continued.

cal court of a county levying a tax of thirty-eight cents on the $100, which recited that it was apportioned as follows: "Three cents for the purpose of creating a sinking fund with which to purchase a poor farm and erect suitable building thereon, ten cents for the maintenance and repair of the public roads and bridges of the county, and twenty-five cents to defray the general county expenses"—specified the purposes of the levy with sufficient distinctness. *Idem*.....28

4. Separation of City from County.—There is nothing in the various special acts relating to the city of Covington to indicate an intention to separate the city from the county of Kenton for governmental purposes. *Idem*. 28

5. Repealing Acts.—The various special acts relating to the city of Covington were repealed by the general act of October, 1892, which was passed in conformity with the mandate of the Constitution requiring uniformity and prohibiting special legislation. *Idem*. 28

6. Bond Issue—Subscription to a Railroad—Recitals.—Where bonds issued by a county in subscription to railroad stock contained no recitals as to the authority of the officers issuing them, or as to the performance of preliminaries requisite to their issuance, there was no estoppel on the county to plead a noncompliance with such conditions, and that they were issued without authority of law. Green County v. Shortell.....108

7. Conditions of Issuance—Notice to Purchasers.—Where the charter of a railroad (1 Sess. Acts, 1869, p. 463, chap. 1578) vested in the company power to construct a road through certain counties, and, in exception to the general law of the State, empowered any of such counties to subscribe to stock, issuing bonds therefor, on such conditions as it might deem fit, and a county did issue bonds on specified conditions to be performed by the railroad, which were not printed on the bonds, but appeared on the orders of record in the county court, a purchaser of such bonds was charged with notice of the conditions upon which they were to be issued, a noncompliance with which would be available as a defense to a suit by him on the bonds. *Idem*. 108

8. Conditions Precedent.—In pursuance of legislative authority, a railroad company filed in the county court a request that there be submitted to the qualified voters the question as to whether the county should subscribe for capital stock of the company, issuing its bonds therefor, upon the condition that the company should construct its road through the county, and within one mile of a certain town, and also upon the further condition

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COUNTIES—Continued.

that the bonds should not be issued, or the county pay any part of either principal or interest, until it should be exonerated from payment of a subscription to the stock of a certain other road. The issue was ordered at an election held for that purpose, and all the orders made in pursuance thereof were conditioned as stated. HELD, that properly construed, the exoneration was a condition precedent, after which the bonds could be issued, but would not be binding in the event of a failure on the part of the railroad to comply with the other condition. *Idem.* 108

9. County Clerk.—An order of the county court directing the clerk to make a subscription to certain railroad stock on behalf of the county, and on the terms specified in the order submitting the question to a vote, was a direction to the clerk to do a merely ministerial act, vested in him no discretion, and was not a delegation of the power vested in the county court to make the subscription. *Idem.* 108

10. Noncompliance with Contract.—Where, by its charter a railroad company was to be built entirely across the State, and, by the terms of the subscription to stock of the road by a certain county through which it passed, bonds were issued, conditioned on the road's being constructed through the county, a subsequent construction by a successor of such road of four and a half miles of railroad in the county was not a substantial compliance with the conditions of the bond issue. *Idem*.....108

11. Estoppel.—Payment of interest on bonds by a county for some years does not estop it to show their invalidity. *Idem*.....108

12. Injunction against Sheriff—Judgment—Subsequent Action by County.—Kentucky Statutes (1899), section 4129, makes the sheriff collector of all taxes, unless otherwise provided. Sections 4148, 4151, 4184, point out the mode of collection by levy on land, &c. Section 4131 provides that when the office of sheriff is vacant, the county court may appoint a collector of taxes. Constitution, section 144, provides that each county shall have a fiscal court, and Kentucky Statutes (1899), section 1834, provides that the corporate powers of the county shall be exercised by the fiscal courts. Section 1840 gives the court control of the fiscal affairs of the county, and provides that it shall have jurisdiction of all matters relating to the levying of taxes, &c. HELD, that as, under the statutes, the sheriff of a county, so far as his powers affect taxation, is merely a tax collector, a default judgment against him in suit by a taxpayer to enjoin the collection of taxes, in which the county is not a party, is not binding on the county in a subsequent action by it to col-

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COUNTIES—Continued.

lect the taxes. Henderson County v. Henderson Bridge Co. 164

13. Interest on Corporate Stock.—Under 2 Acts, 1850-51, page 444, chapter 505, section 5, which provides that a certain railroad "shall allow to all subscribers and holders of stock under the company, interest on the same from the time of paying for said stock" up to the time of making the first dividend, interest did not begin to run on the stock from the date on which a county subscribing therefor issued bonds in payment thereof, but from the date of the delivery of the bonds to the company, though the bonds bore date anterior to their delivery, and the purchasers thereof would be entitled to interest from their date. Hart Co. v. L. & N. R. R. Co.....186

14. Delivery of County Bonds in Payment for Stock—Presumption.—Evidence that counties, as subscribers of stock in a railway corporation, frequently delivered their bonds in payment of stock subscriptions after the time the bonds bore date, tends to overcome the presumption that bonds issued by a particular county in payment of stock subscribed by it were delivered to the corporation the day they were dated. *Idem*.....186

15. Best Evidence.—Where there was no evidence to impeach the correctness of the record of a corporation showing the transactions between it and their stockholders, had about fifty years before, its record showing the date a subscriber paid for stock by delivering to it bonds, is the best evidence as to the date when the stock was paid for. *Idem*.....186

16. Rights of Stockholders.—Under Acts 1851-52, page 742, chapter 429, section 15, which provides that a certain railroad shall, on the date of the first dividend, and thereafter on presentation and surrender at the company's office of tax receipts for taxes paid to defray interest on bonds given by a county in payment of corporate stock, issue to the holders of tax receipts stock for the same, and 1 Acts, 1855-56, p. 188, chapter 20, section 4, which declares that the holders of stock issued to such taxpayers shall be entitled to all the rights and privileges of stockholders, except that such stock shall not bear interest, a taxpayer paying taxes to defray interest on county bonds issued in payment of corporate stock is entitled to an amount of stock equal to the tax receipt, together with all cash and stock dividends, declared on such stock. *Idem*.....186

17. Estoppel of County.—A corporation was required to allow to all stock subscribers interest from the time of paying for the stock to the time of making the first cash dividend. In 1861 it declared a stock dividend as of April 1st following. A stock

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COUNTIES—Continued.

subscriber denied the right of the corporation to stop the running of interest, except by its declaring a cash dividend. At the meeting declaring this dividend, a county, as stock subscriber, was represented by a sinking fund commissioner. At a subsequent meeting of stockholders, the county was represented by two sinking fund commissioners, who joined with other stockholders in declaring invalid the claim of the stockholder denying the right to stop interest except by a cash dividend. Subsequently the corporation declared and paid several cash dividends on the basis that interest stopped by the payment in 1862 of the dividend declared in 1861, and the county acquiesced therein. HELD, that the county was estopped from claiming that interest continued to the time the corporation declared the first cash dividend. *Idem.* 187

18. Right of Transferee.—A transferee of corporate stock acquires the right to any interest due on the stock, though payable in stock instead of cash. *Idem*.....187

19. Highways—Repairs.—A county court has no authority to let contracts concerning the repairs of public roads. Perry County v. Engle. 594

20. County Courts—Authority—Road Supervisors.—Under Kentucky Statutes, 1899, section 4339, governing the cutting down of hills on public roads by contract, providing that the road supervisor, on order of the county judge, may let the work to the lowest and best bidder, and concluding, "If there be no supervisor, the fiscal court may order such work done in the manner provided in this section by the county judge or a commissioner appointed by it," where the fiscal court had not appointed a supervisor of roads, the action of the county court in appointing a commissioner, and the action of the commissioner is letting such work to a contractor, were void, and the county was not liable therefor. *Idem.* 594

21. Notice.—All persons must take notice that a county can contract only in the manner and by the persons and for the purposes expressly provided by statute.—*Idem.* 594

COUNTY BONDS—
See Counties.

COUNTY CLERK—
See Office, &c., 8.

COUNTY COURTS—
See Counties, 19, 20, 21.

COUNTY JUDGE—
See Road Supervisor, 1; Office, &c., 4, 5, 6, 7.

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CRIMINAL LAW—

1. Rape—Indictment.—An indictment charging that defendant willfully and feloniously had intercourse with a female against her will or consent, or while she was insensible, or incapable of exercising her will, a drug having been administered to her, need not allege that he knew she was incapable of giving consent by reason of the administration of a drug. Commonwealth v. Lowe. 335

2. Duplicity.—An indictment charging that defendant feloniously had intercourse with a female against her will or consent, or while she was insensible or incapable of exercising her will, a drug having been administered to her, is not duplicitous, but is proper, under Criminal Code, section 126, providing that an indictment must charge but one offense; but if it may have been committed in different modes, or by different means, the indictment may allege the modes and means in the alternative. *Idem.* 335

3. Betting on Election.—A bet on the result of an election, made after the holding of the election and after the announcement of the result, is not a violation of Kentucky Statutes, 1899, section 1975, punishing the betting on any election held under the State or Federal Constitutions. Commonwealth v. Leak. 540

4. Defective Warrant.—A warrant charging defendant with having on November 20, 1901, bet on the result of the election for Governor on November 7, 1901, is fatally defective, in the absence of a specific allegation that the result of the election was not known, where, as a matter of fact, no election for Governor was held in 1901, and the last election preceding the issuance of the warrant, 1902, was held in 1900, as it will be presumed that the result of the election had been determined and announced at the time of the alleged bet. *Idem*.....540

5. Murder—Appeal—Evidence.—The court, on appeal in a criminal case, can not reverse for insufficiency of evidence if there is any evidence conducing to show the guilt of accused. Rowsey v. Commonwealth. 617

6. Malice—Proof.—Evidence that defendant shot deceased while deceased was with a girl named J., after using offensive and overbearing language and conduct towards deceased; that, a few days before, he had said to a man who was with J.: "J. won't let me go with her, and by ——! you shall not go with her;" that, just before going where deceased was, he told a person to "Take your knife along. I am going to raise such a smoke . . . that you will need a knife to cut it away"—is suffi-

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CRIMINAL LAW—Continued.

cient to show that the real basis of his conduct was jealousy, and to prove malice. *Idem*.....617

7. Self Defense—Question for Jury.—Whether defendant believed there was necessity for shooting deceased to protect himself, and whether there were reasonable grounds for the belief, are questions for the jury. *Idem*.....617

8. Instruction—Actual Danger.—An instruction that if deceased began the fight, and defendant had "reasonable grounds to believe," and did believe, that he was in immediate danger, and he shot to avert it, he was entitled to an acquittal, embraces the idea that, if there were such appearances of danger as to beget in defendant's mind a reasonable belief of actual danger, he was entitled to an acquittal, whether the appearances were real or not. *Idem*. 617

9. Right to Kill.—The right to kill in self-defense depends on there being no other apparently safe means of averting the impending danger. *Idem*. 617

10. Dying Declarations.—Statement of deceased at the time of making declarations that he had no hope of recovery, and was preparing to meet his Maker, taken in connection with the desperate character of his wounds, is sufficient evidence that he was conscious of his approaching death to make his declarations admissible as dying declarations.—*Idem*.....617

11. Concurrent Jurisdiction—By Whom Exercised.—Where criminal jurisdiction is concurrent, the court which in good faith first begins the prosecution obtains jurisdiction. Moren v. Commonwealth 859

12. Police Courts—Exclusive Jurisdiction—Ordinances.—When construed with Const., section 143, providing for the establishment of police courts, with jurisdiction in cases of violation of municipal ordinances, and such criminal jurisdiction as appertains to justices of the peace, charters of third class cities and sixth class towns give police courts exclusive jurisdiction only in cases of violation of ordinances, and their criminal jurisdiction under general law is merely concurrent with that of the other courts. *Idem* 859

13. Murder—Motive—Evidence.—In a prosecution for murder, on March 6th, of a paramour, where the proof is circumstantial, evidence that on December 23d decedent obtained insurance on her house and its contents, which were burned on January 20th, a few days prior to which defendant procured the removal of some of the goods, gratuitously paying the truckman's license fee to the city in addition to his regular charge, and that the loss was paid on February 28th, prior to which defendant had attempted to collect it on the false representation that

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CRIMINAL LAW—Continued.

the policy had been assigned to him, is admissible to show motive for the homicide. Bess v. Commonwealth.....927

14. Declarations of Decedent—Admissibility.—In a prosecution for murder, the declaration of decedent a few days before the homicide, to a police officer, that defendant had $220 of her money which he refused to pay, and to recover which she spoke of getting a warrant out against him, is admissible, having been reported to defendant by the officer before decedent's demise. *Idem*. 927

15. Statements of Defendant.—In a prosecution for homicide, in which evidence was introduced tending to show that the motive was to obtain or retain money belonging to decedent, defendant's declaration that he wished to borrow twenty dollars of decedent, but that she made him a present of it, and gave him $200 more to keep, and that he afterwards, at her request, returned her $100, is admissible. *Idem*.....927

16. Rejected Evidence—Identification.—In a prosecution for murder, an instruction that "there may have been" evidence to show some other crime (the evidence not being indicated), and that, if such evidence proved defendant guilty of some other offense "against law or against morals," the jury should not "allow that fact, whatever it may be," to bias them or make them find defendant guilty under the indictment, except in so far "as the fact itself, whatever it may be" conduced to prove him guilty of the crime charged, and that it was the court's duty to tell the jury of the "rejection of certain testimony and the purposes for which other testimony was admitted" (without further identification of the evidence referred to), is so indefinite and ambiguous as to constitute error. *Idem*.....927

17. Instructions.—Where evidence is ordered rejected after it has gone to the jury, the court, in instructing as to its exclusion, should specify it in detail, and should name the witnesses from whom it has been elicited, in order to identify it. *Idem*.....927

18. Particular Facts—Undue Prominence.—Where evidence otherwise incompetent is admitted for a specific purpose, the court, without quoting it in detail or giving undue prominence to particular facts, should instruct the jury for what purpose alone the evidence is to be considered. *Idem*.....927

DISAFFIRMANCE—

See Infants, 2.

DOUBLE LIABILITY—

See Corporations.

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DOUBLE PUNISHMENT—

See Local Op., 3, 4.

DRAINAGE OF LAND—

1. Ditches—Special Assessments—Lien—Enforcement—Individual Liability of Landowner.—Act March 23, 1900; Laws 1900, p. 110, c. 30 (Kentucky Statutes, section 2400), relative to the construction of drainage ditches, etc., provides that on the completion of an allotment of a ditch the county surveyor shall give the landowner a certificate, which shall state the amount due the contractor for constructing the ditch, which amount shall be a lien on the land; and that, if any land against which an assessment has been made shall change hands, the sheriff shall give the new owner notice of the amount due, and on failure to pay, that the land shall be sold to satisfy the tax. HELD, that the assessment is not a claim against the owner individually, but against the land itself, which is liable to sale for satisfaction of an assessment, notwithstanding that the one to whom it was assessed has personal property from which the assessment might be satisfied. Scherm v. Short, Sheriff.....946

DRUGGISTS—

See Mun. Corp., 13.

DUPLICITY—

See Cr. Law, 2.

DYING DECLARATIONS—

See Cr. Law, 10.

EASEMENTS—

See Surface Water, 2.

ELECTRIC PLANT—

See Mun. Corp., 19, 20, 21.

ESTOPPEL—

See Counties, 11, 17; Husband and Wife, 4; Office, &c., 7; Roads, &c., 4; Trust Estates, 10.

EVIDENCE—

See Cr. Law, 5, 13 to 18; Life Ins., 1; R. R., 17; Master, &c., 13, 14, 15; Pleading, 2, 3; Automobile, 2.

EXECUTIONS—

1. Lien—When Created.—From the moment an execution is placed in the hands of an officer for collection a lien is created for its payment on all the property of the defendant in the execution. Richart v. Goodpaster, &c.....637
2. Levy on Joint Property—Failure to Appraise.—Civil Code, sec-

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EXECUTIONS—Continued.

tion 660, relative to execution levies on joint property, provides that where an officer levies execution on property held by the execution debtor jointly with another person he shall not deprive such person, without his consent, of the possession of the property, except for the purpose of having it inventoried and appraised, which he shall cause to be done, etc. HELD, that where an execution against one having a joint interest in a crop of tobacco was placed in the hands of a constable, who made a levy and indorsed the same on the execution, the fact that he failed to appraise and inventory the property did not prevent the existence of an execution lien, the purpose of section 660 being to protect the rights of joint owners. *Idem*.....637

EXEMPTIONS—

See Homesteads.

FEDERAL CONSTITUTION—

See Non-Residents, 4; Pool Rooms, 4.

FELLOW SERVANTS—

See Master, &c., 6.

FERRIES—

1. License—Notice—Process.—Notice of an intended application for a grant of a ferry privilege is equivalent to service of process on all persons interested. Clark County Court v. Warner...601
2. Courts—Concurrent Jurisdiction.—On an application to a county court for a ferry privilege the statutory notice was given, and another who sought the privilege claimed under a transfer from a corporation which claimed the land on the other side of the river where the ferry would land. After appeal to the circuit court the corporation appeared and presented a written transfer, and it was made a party. The court continued the cause for certain evidence. HELD, that pending such cause the county court of the county in which the ferry would land on the other side of the river had no jurisdiction to entertain an application by the corporation for a ferry privilege identical with the one already sought. *Idem*.....601
3. Writ of Prohibition.—By virtue of Civil Code, section 479, defining prohibition to be an order of a circuit court to an inferior court, prohibiting it from proceeding in a matter without its jurisdiction, the circuit court, in which the application for a ferry privilege was pending, had authority to issue prohibition to the court entertaining the application of the corporation. *Idem*. 601

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FISCAL COURTS—
See Road Supervisors; Counties, 19, 20, 21.

FOREIGN CORPORATIONS—
See Removal of Causes, 6; R. R., 16.

FOREIGN JUDGMENTS—
See Limitation, 7.

FRANCHISE—
See Mun. Corp., 1 to 7.

GAMING—
See Pool Rooms, 10.

GIFTS—

1. Deed—Recital—Interest on Note—Delivery to Donee.—Where a deed recited that part of the consideration was a note, with interest payable annually for the use of a certain person, during her life, there was a valid gift of the interest, though the note was not delivered to the donee. Malone's Committee v. Lebus. 975
2. Acceptance—Presumption.—Where the donee of a gift *inter vivos* is of unsound mind, the law will presume an acceptance. *Idem.* 975
3. Lien—Notice—Purchaser.—Where a recorded deed showed that part of the consideration was a note, the interest on which was payable for the use of a certain person during her life, and a lien was reserved as security for the note, a subsequent purchaser was bound in the same manner as the first purchaser. *Idem.* 975

GOVERNOR—
See Office, &c., 3.

HOMESTEADS—

1. Exemptions—Donation.—An illegitimate son on the death of his putative father received from decedent's widow and heirs a parcel of land belonging to the estate. The land was worth less then $1,000. The son lived on it with his family. HELD, that the land was a homestead, exempt from the liability of a judgment rendered against him before he acquired it, he not being a purchaser within the meaning of the homestead law making land purchased by a debtor after the creation of the debt liable therefor. Roark v. Bach, &c.....457
2. Right to Convey to Wife.—A debtor entitled to land as a homestead has the right as against his creditor to give it or its proceeds to his wife. *Idem.* 457
3. Occupancy.—Kentucky Statutes, 1899, section 1707, providing that

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HOMESTEADS—Continued.

the homestead shall be for the use of the widow so long as she occupies it, and section 1708, giving a surviving husband the same rights in the homestead of his deceased wife, do not vest a surviving husband with an unconditioned vendible life estate in the homestead, but only with an estate dependent on its occupancy by him. Clay's Guardian v. Wallace.....599

4. Abandonment.—Where a surviving husband procures the unconditional sale and conveyance of his deceased wife's homestead in a suit for that purpose against her minor children, this amounts to an abandonment by the husband, and he can not claim a life interest in the proceeds. *Idem*.....599

5. Life Estate—Value—How Determined. Kentucky Statutes, 1899, section 1702, provides that there shall be exempt from sale under execution land not to exceed in value $1,000; and section 1703 declares, that, before a sale under execution of land occupied as a homestead, the officer shall cause such part thereof as shall not exceed in value $1,000 to be set a part to the debtor. HELD, that where a debtor was seised of a life estate only in land, which he occupied as a homestead he was entitled to a homestead exemption in such part of the land as was worth $1,000, and not such part with regard to which the value of a life estate therein would equal $1,000. McDowell, Sheriff, v. Grubbs.....751

HUSBAND AND WIFE. (See Homesteads, 2, 3, 4.)

1. Mortgage by Wife Alone—Void as to Realty.—Under Kentucky Statutes, section 2128, authorizing a married woman to make contracts as though she was single, except that she may not mortgage her real estate without joinder of her husband, a married woman's mortgage of her real estate in which her husband did not join is void. Deusch, &c. v. Questa, &c.....474

2. Judgment against Wife—Binding.—Under Kentucky Statutes, section 2128, providing that a married woman may sue and be sued as a single woman, a judgment against a married woman alone, in an action to foreclose a mortgage given by her in which her husband did not join as required by said section, is binding on her and her heirs. *Idem*.....474

3. Same.—The children of the wife take only such rights as she had, and they are likewise bound by the judgment against her. *Idem*.....474

4. Estoppel.—In conferring upon married women the power to sue and be sued alone, the Legislature relieved them from the power of their husbands in all actions, and the estoppel of a judgment operates upon them in all cases as though they were unmarried. *Idem*.....474

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HUSBAND AND WIFE—Continued.

5. Wife's Will—Consent of Husband—Devise of Personalty.—General Statutes, article 4, chapter, 52, section 15, provides that corporate stock transferred to a *feme sole*, and expressed on the transfer book to be for her use, could be disposed of by will with the consent of her husband, or without his consent if so expressed in the deed or will creating the trust. Kentucky Statutes, 1899, section 2147, converts all personalty of married women into separate estate, and confers power, of deposition by will, subject to the provisions of the act. HELD, that a married woman can dispose of her personal estate by will, with the consent of her husband; the right having existed at common law, and not having been abridged by statute. Louisville City Natl. Bank v. Woolridge, &c.....641
6. Fraud as to Creditors.—Kentucky Statutes, 1899, section 1906, provides that every gift, conveyance, etc., of any estate, with intent to delay, hinder and defraud, shall be void as against creditors. HELD, that the statute refers to property owned by the debtor, and it is no fraud as to his creditors for a husband to consent to a wife's testamentary disposition of her personalty. *Idem*. 641
7. Remainder.—Where a will gives testatrix's daughter a bequest, with a provision that if the daughter die before testatrix or the daughter's husband the legacy shall vest in the husband, the bequest in remainder takes effect only in the event of the death of the first taken before testatrix. *Idem*.....641

INDICTMENTS—

See Marriage, 1; Office, &c., 8; Penal Actions, 1; Physicians, 3, 4.

INFANTS—

1. Conveyance By—Subsequent Conveyance After Majority—Knowledge by Last Purchaser of First Deed.—A purchaser of land from a grantor who had, during infancy, made a prior conveyance thereof to another, was not precluded from acquiring a good title by reason of his knowledge of such prior conveyance. Ison, &c. v. Cornett.....92
2. Disaffirmance—Conditions.—One who has purchased land from an infant, and given in part consideration therefor other land, which the infant has also sold, can not demand of such infant a disaffirmance of the latter sale as a condition of disaffirming the sale to him. *Idem*.....92
3. Reconveyance—Election to Disaffirm.—A stepfather, standing to his stepdaughter in *loco parentis*, traded to her, when she was seventeen years of age, for property belonging to her, property

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INFANTS—Continued.

and money amounting in all to $550. When the daughter became of age, she elected to disaffirm her conveyance, and sold the property to another for $1,100, her father having in the meantime cut $200 worth of timber therefrom. HELD, that the father could recover the land which he had conveyed, so far as it or its representative was still retained by the daughter, and would be charged with the value of the timber which he had cut, and the reasonable rental value of the land while in his possession. *Idem.* 92

4. Real Estate—Descent—Proceeds.—Kentucky Statutes, 1899, section 1401, provides that if an infant die without issue, having the title to real estate by descent from one parent, the whole shall descend to that parent and his or her kindred. Civil Code Prac., ch. 14, section 494, subsec. 6, relating to the sale of real estate of persons under disability, provides that if the owner of real estate which has been sold under the provisions of the chapter die during infancy the person who would have been entitled to the property shall be entitled to the proceeds. One died in infancy leaving the proceeds of sale of real estate inherited from her father. HELD, that her paternal uncles and aunts were entitled to the proceeds, to the exclusion of her mother. Weisiger, &c. v. McDonald, &c.....862

5. Conversion—Action—Parties.—Where defendant had illegally converted the proceeds of her infant daughter's real estate, the persons entitled thereto had a right to sue defendant alone to recover it, and to dismiss as to others whom they had sued with her. *Idem.* 862

INJUNCTIONS—

See Mun. Corp., 1; Prize Fighting, 4.

INSTRUCTIONS—

See Cr. Law., 17, 18.

INSURANCE COMMISSIONER—

See Attorney's Fees, 1.

INSURANCE, FIRE—

1. Adjustment of Losses—Appointment of Appraisers.—Where a fire policy stipulates that the ascertainment of the amount of a loss shall be made by the insured and the insurer, and, if they differ, then by appraisers, there must be a real difference before a demand for appraisers can properly be made, and the act of the insurer in merely declining to pay the sum fixed in the itemized account of the insured is not a disagreement. Continental Ins. Co. v. Vallandingham & Gentry.....287

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INSURANCE, FIRE—Continued.

2. Defense.—The stipulations in a fire policy that if the insured and insurer differ in estimating the amount of a loss, appraisers shall be appointed, and that no suit shall be brought on the policy until after full compliance by the insured of the foregoing requirements, are valid, and the failure of the insured without good excuse to submit the adjustment of the loss to appraisers is a good defense to a suit on the policy. *Idem*....287
3. Insurer—Bad Faith.—The stipulations in a fire policy providing for the adjustment of the amount of a loss, if the insured and insurer differ, by appraisers, and prohibiting a suit on the policy until the insured has complied with the foregoing requirement, are inserted wholly for the protection of the insurer, who will not, therefore, be allowed to use them oppressively or in bad faith. *Idem*. 287
4. Waiver.—Where a fire policy stipulates for the adjustment of the amount of a loss, in case the insured and insurer differ, by "two competent and disinterested appraisers," the insured and insurer each selecting one, and the two electing a competent and disinterested umpire, the insurer, by selecting as one appraiser a partisan willing and anxiously persistent in serving the insurer's interests, waives the appraisal by appraisers, and the insured may decline to renew the arbitration at the hands of such appraiser or any other. *Idem*. 287

INSURANCE, LIFE—

1. Evidence—Transaction with Deceased Agent.—Under Civil Code, section 606, providing that no person can testify for himself as to a transaction with one who is dead, an insured who was a party to an action to compel the insurance company to issue a paid-up policy was not entitled to testify as to a conversion between himself and an agent of the insurance company who had since died. Mutual Life Ins. Co. v. O'Neil, &c. 742
2. Paid-up Policy—Forfeiture.—Where a life insurance policy provided that if it should be forfeited the insured should be entitled to a paid-up policy on demand within thirty days after forfeiture for the equitable value of the original policy, time was not of the essence of such agreement, and insured was entitled to a paid-up policy if demanded within a reasonable time. *Idem*. 742
3. Demand—Time—Laches.—Where an insured made no demand for the issuance of a paid-up policy until more than seven years had elapsed after a forfeiture of his original policy, and no suit was brought to compel the issuance of such paid-up pol-

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INSURANCE, LIFE—Continued.

icy until nearly seventeen years had elapsed after the right to such policy accrued, such right was barred by laches. *Idem*..742

INTERSTATE COMMERCE—

See Pool Rooms, 12.

INTOXICATING LIQUORS—

1. License to Retail—Application—Qualification—Duty of Court.—Where an applicant for a license to retail liquors complies with all the provisions of the law, and there is no objection from any one of the legal voters in the neighborhood in which the license is to be exercised, nor any proof that the applicant is a person of bad character or will not keep an orderly and law-abiding house, it is the plain duty of the county judge to grant the application. Hodges v. Metcalfe County Court...524
2. Refusal to Grant—Appeal.—Where an appeal is taken to the circuit court from the judgment of the county court refusing to grant an application for a liquor license, the court must hear the case on a bill of exceptions only. *Idem*.....524
3. Discretion of Court.—Where, on appeal to the circuit court from the refusal of the county court to grant an application for a liquor license, the bill of exceptions showed that the county court had no discretion in the matter, but should have granted the application, the circuit court should merely remand the case, with directions to grant the application. *Idem*.....524

JAILERS—

1. Cities—Liability for Keep of Prisoners. Under Kentucky Statutes, 1899, section 1730, fixing the liability of a city for the keep of prisoners confined for a breach of the by-laws or ordinances of a city and for the violation of a statute where the city gets the benefit of a fine, and section 3155, providing that all fines and penalties collected in a police court shall be for the benefit of the city, a city is liable for the keep of all prisoners convicted in the police court where there is a fine imposed and the prisoners are sent to the county jail, though section 3151 forbids prisoners for whose maintenance the city would be liable from being confined except in the city workhouse. City of Lexington v. Gentry.....528
2. Police Courts.—A county jailer can not refuse to receive prisoners committed to his custody by a judgment of the police court of a city, where the court had jurisdiction to try the offense and of the person charged therewith, though the commitment should have been to the city workhouse. *Idem*.....528
3. Sheriffs.—A city is not liable to the sheriff of the county for

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JAILERS—Continued.

the keep of prisoners committed to his care either for appearance or under sentence when a fine constitutes no part of the punishment, under Kentucky Statutes, 1899, section 1730, making the city liable for the keep of prisoners where it gets the benefit of a fine. *Idem*.....528

JUDGMENTS. (See Limitation, 6, 7, 8; Trust Estates, 9; Counties, 12)

1. Final Judgment—On Rule—Res Judicata.—Land having been sold under a judgment, and paid for, the judgment was afterwards vacated, a new trial ordered, the sale set aside, and the purchaser adjudged to have a lien on the land for the price paid. The petitioners for the new trial took out a rule requiring a party in the action to pay into court the sum received by him under the judgment. A demurrer to the rule was sustained on the ground that the part of the order adjudging a lien on the land was interlocutory, and the petitioners were not affected thereby. HELD, that this decisions, though erroneous, was final, and effective in bar of a later rule for the same purpose. Stum's Admr. v. Stum, &c.....534

JUDICIAL SALES—

1. Advertisement—Three Days Before Sale—Daily Paper—Sunday.—Where a decree directs a sale of mortgaged property to satisfy the debt, and requires an advertisement of the sale in a certain paper for three consecutive days next preceding the ady of sale, in compliance with Act March 24, 1902, (Acts 1902, p. 213, c. 92), an advertisement on Thursday, Friday and Saturday in a paper published daily except Sunday, where the sale was made on the following Monday, was sufficient. Wilson, &c. v. Petzold.....874

JURISDICTION—

See Non-Residents, 9; Roads, &c., 1; Cr. Law, 11, 12; Ferries, 2; Appeals, 1.

JUSTICES' DISTRICTS—

See Counties, 1 to 8.

LANDS—

1. Ejectment—Title Bond—Exhibit—When to be Filed.—A defendant in ejectment, relying on an equitable title through a title bond, can not be required to file his bond before the trial, Civil Code, section 128, provides that a writing other than an evidence of indebtedness on which a party intends to rely as evidence may be filed with the pleadings, or, by leave of court,

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LANDS—Continued.

at any time pending the action. Burkhart v. Loughridge, &c. 604

2. Execution—Proof of.—Though a title bond is recorded, the party relying on it to establish title must prove its execution affirmatively. *Idem.* 604

3. Defense—Time to Prepare.—If a party in ejectment relying on a title bond to the premises does not file the bond before trial, as he may do under Civil Code, section 128, the trial court can allow the adverse party reasonable time after the bond is filed to prepare a defense. *Idem*....604

4. Issue—Notice—Trial.—A defendant in ejectment who relies on a recorded title bond which he claims is lost, but which he alleges plaintiffs had notice of, is entitled to have the issue as to notice tried, even though he does not produce the bond on the court's order to do so. *Idem*....604

5. Sale of Mineral Rights—Written Contract—Parol Extension—Statute of Frauds.—Kentucky Statutes, 1899, section 470, subsection 6, provides that no action shall be brought to charge any person on any contract for the sale of real estate, unless in writing. A written contract for the sale of mineral rights in land provided for the payment of the consideration before a certain time, and that, if not paid, the contract should be void. The consideration not being paid at this time, the parties entered into a parol agreement extending the former contract. HELD, that as the original contract was terminated by a failure to make payment as required, the parol agreement for extension of time was, under the statute, void because not in writing. McConathy, &c. v. Lanham, &c....735

LESSOR AND LESSEE—

See R. R., 1.

LIBEL AND SLANDER. (See Bankruptcy.)

1. Criminal Responsibility—Words Imputing Disposition to Commit Crime.—A written communication charging that a certain person would purloin a printing outfit if he had a chance at it, being calculated to bring him into contempt in the community in which he lives, is *per se* actionable, and sufficient to support an indictment for criminal libel. Browning v. Commonwealth....282

2. Privileged Communications.—A written communication charging that a certain person would purloin a printing outfit if he had a chance, and requesting the addressee to protect it, can not be held privileged without the showing of any facts which reasonably induced the writer to believe his property was in dan-

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LIBEL AND SLANDER—Continued.

ger, or any necessity for his communication in reference thereto. *Idem.* 282

LICENSE—

See Intoxicating Liquors, 1, 2, 3.

LICENSE TAX—

1. Real Estate Agent—Pleading—Conclusions of Law.—An allegation that a license tax of twenty-five dollars on real estate agents is unequal, unjust, and disproportionate to that on other occupations, without the recital of any facts to support it, is a mere conclusion of law. City of Covington v. Herzog.....725
2. City Ordinance—Taxing Occupations—Constitutionality.—Constitution, section 174, provides that all property shall be taxed in proportion to its value, and that nothing in the Constitution shall be construed to prevent the General Assembly from providing for taxation based on license. Section 181 provides that the General Assembly may delegate the power to cities to impose license fees on trades, occupations, and professions. HELD, that Kentucky Statutes, 1899, section 3058, authorizing cities of the second class to levy a tax on "real estate agents and brokers, financial agents and brokers, house agents, rental agents, loan and brokerage companies," and a city ordinance levying a license tax of twenty-five dollars on real estate agents, so defined as to include all these classes, are not unconstitutional, though several occupations are grouped under one head. *Idem.* 725

LIENS—

See Admiralty, 6, 7, 8; Admrs., 1 to 5; Wells, 9; Executions, 1, 2.

LIMITATION. (See Married Women.)

1. City Bonds—Presentation.—The statute of limitations begins to run against an instrument payable at maturity at a certain time and place on presentation, though there is no presentation. Wurth v. City of Paducah.....403
2. Promise to Pay Before the Bar.—The reply in an action, on the original promise to pay bonds, commenced seventeen years after their maturity, alleging that the debtor at all times since issuance of the bonds recognized them as its indebtedness, and within the last fifteen years promised to pay them, is ineffectual to take the case out of the bar of the statute, it not alleging that the promise to pay was made before the bar, and within the statutory period, while the debtor was legally bound to pay the bonds. *Idem.* 403

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LIMITATION—Continued.

3. City Council—Authority to Extend Liability.—The mayor and council of a city can not, without legislative authority, extend its liability for its indebtedness, beyond the express terms of its bonds, so as to remove the bar of the statute. *Idem*.....403
4. Levying Tax.—The levying and collection of a tax by a city to pay its bonds does not extend the time for suit on the bonds. *Idem*. 403
5. Trust Fund.—The levying and collection of a tax by a city to pay its bonds does not make the taxes a trust fund for payment of the bonds, suit on which is barred by limitations. *Idem*. 403
6. Judgment—Execution Therein—Effect.—An execution issued in the name of a foreign administrator on a judgment rendered in favor of the decedent suspends the running of the limitations fixed by Kentucky Statutes, 1899, section 2514, providing that an action on a judgment shall be commenced within fifteen years from the date of the last execution, though the administrator failed to give the bond required by Civil Code Practice, section 404, requiring a foreign administrator to give a bond conditioned on his disposing according to law of any property received on the execution. McDonald v. Stembridge's Admr..731
7. Judgment—Foreign State—Effect.—Constitution United States, article 4, section 1, requires full faith and credit to be given in each State to the judicial proceedings of every other State, and Rev. St. U. S., section 905 (U. S. Comp. St., 1901, p. 677), provides that the judgment of any court of any State shall have the same force and effect in any other State as in the State where rendered. HELD, that whether a judgment dismissing as action on a note in New York on the ground that it was barred by limitations of that State was a determination on the merits of the case, and therefore barred another action on the note in Kentucky, depended on the effect which would be given to such judgment by the courts of New York. Brand v. Brand, &c. 785
8. Non-Resident—Plea in Bar—Remedy.—Plaintiff held a note against defendant, who was a resident of New York, and for the purpose of collection only, assigned it to G., who brought suit thereon in New York, in which the court directed judgment for defendant on the ground that the action was barred by the New York statute of limitations. Thereafter plaintiff brought suit on the note in Kentucky, and defendant pleaded the New York judgment as a bar. HELD, that since, under the decisions of New York, a judgment based solely on the statute of limitations is held to affect the remedy only, and not the cause of

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LIMITATION—Continued.

action, such judgment was no bar to plaintiff's action in Kentucky, where a different statute of limitations prevailed. *Idem.* 785

LIS PENDENS—

See Administrators, 1 to 5.

LOCAL OPTION LAW—

1. Requiring Bond for Good Behavior—Validity.—Act March 11, 1902 (Acts 1902, p. 41, chap. 14), entitled "An act for the better enforcement of" the local option act of March 10, 1894 (Acts 1894, p. 123, chap. 52), "and to amend section 4" thereof, and which defines the essentials of an indictment for a violation of the law, makes it unlawful for any person to furnish another liquor in a local option district, declares that the possession of a United States license shall be *prima facie* evidence of guilt, authorizes the court to require one on a second conviction to give a bond for his good behavior, provides that the place of sale of liquors shipped into a local option district shall be the place where the money is paid or goods delivered, and prohibits the sale of liquor in any local option district, relates only to one subject, which is expressed in its title, within Constitution, section 51. Hyser v. Commonwealth.....410
2. Second Conviction.—Act March 11, 1902, section 3 (Acts 1902, p. 42, chap. 14), providing that on the second or any subsequent conviction for, a violation of the local option law the court shall require the defendant to execute a bond for his "good behavior" for twelve months, is not void for uncertainty because of the use of the phrase "good behavior." *Idem*.....410
3. Double Punishment.—The section is not unconstitutional as imposing double punishment, the requirement of the giving of the bond, if regarded as a punishment, being not for the former offenses, but such former offenses merely aggravating the last offense, and the provision being merely declaratory of the common law. *Idem.* 410
4. Same.—Act March 11, 1902, section 3 (Acts 1902, p. 42, chap. 14), providing that "on the second or any subsequent conviction for a violation" of the local option law the court shall require defendant to execute a bond for his good behavior, refers to a conviction of defendant for an offense committed after his conviction for a previous offense. *Idem*.....410

LOWEST AND BEST BIDDER—

Street Imp., 1, 2, 3.

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MANDAMUS—

See Office, &c., 3.

MARRIAGE—

1. Wrongful Solemnizing—Accessories—Indictment.—Under Statutes (1899), section 2110, making it a penitentiary offense for one not authorized to solemnize a marriage under a pretense of having authority, and section 1128, providing that in all felonies accessories before the fact shall be liable to the same punishment as principals, an indictment alleging that one solemnized a marriage between defendant and another, and that defendant procured him to so solemnize it, knowing that he did not have authority, is sufficient. Barclay v. Commonwealth.....275
2. Though Statutes (1899) section 2102, provides that no marriage solemnized before any person professing to have authority therefor shall be invalid for want of such authority, the rule that a wife can not testify against her husband does not apply on prosecution of the man for procuring one without authority to solemnize his marriage, though the woman did not know that the person solemnizing it did not have authority. *Idem.* 275
3. To show that a mock marriage took place in the State, one who knew the place, but did not know the location of the State line, may testify to having shown it to another, and he may testify to her having shown it to him. *Idem*.....275
4. Witnesses may testify to admissions made to them by defendant. *Idem.* 275
5. Refusal to open the case during the argument, and allow introduction of newly discovered evidence, going only to impeach a witness' testimony, is not an abuse of discretion. *Idem*....275
6. Testimony as to what a witness said when persons went to take his testimony, being competent only to contradict his testimony, is not admissible, proper foundation for the contradiction, by his being asked as to the statements, not having been laid. *Idem.* 275

MARRIED WOMEN—

1. Right to Sue—Limitation—Statutes—Implied Repeal.—Kentucky Statutes, 1899, section 2506, providing that if, at the time the right of any person to bring an action for the recovery of real property accrued, such person was a married woman, she may, though the period of fifteen years has expired, bring an action within three years after such disability is removed, is not repealed by section 2128, providing that a married woman may take, acquire, and hold property, make contracts, and sue and be

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MARRIED WOMEN—Continued.

sued, as a single woman, etc. Sturgill, &c. v. Chesapeake & Ohio Ry. Co. 659
Higgins v. Stokes, &c. 664

MASTER AND SERVANT—

1. Inadequate Assistance—Negligence.—A master is liable for the injury sustained by a servant while unloading steel shafts from a car by reason of the foreman's failure to exercise ordinary care in providing a sufficient number of men to assist in doing the work. Illinois Cent. R. R. Co. v. Langan.....318
2. Assumption of Risk.—A servant employed to unload steel shafts from a car did not assume the risk incident to the master employing an inadequate force to assist where the probability of injury was such that the judgment of prudent men might differ on the certainty of its happening, or with reference to whether the force was reasonably adequate to perform the work, and where the master insisted, after objection, that the servant proceed with the work. Illinois Central R. R. v. Langan.....318
3. Dangerous Service—Negligence of Master—Duty to Provide Safe Premises.—An employe at a factory was injured while carrying a bucket of heavy fluid up some movable steps to pour into a revolving cylinder, when, by something giving way, he was thrown into the cylinder and three ribs broken and his arm so injured that it had to be amputated. He knew the work was dangerous, and had worked there before, but not within the past year. HELD, that whilst it is the duty of the servant to exercise that degree of care which is commensurate with the character of his employment in order to protect himself from injury, and if he fails to exercise this care he can not recover for an injury to which his own negligence has contributed, it is the primary duty of the master both to provide and keep in a reasonably safe condition the place of work, and this duty is more important than the duty of the servant to use reasonable care to protect himself. Henderson Tob. Ext. Works v. Wheeler. 322
4. Minute Examination not Required of Servant—Primary Liability of Master.—Where the servant was directed by his master's foreman to work in a dangerous place, where neither the step nor the foundation afforded a safe place in which to perform such dangerous service, the servant was not required to make a minute examination of the approaches thereto, but had a right to believe that they were safe; and the master can not escape his primary liability to keep the place safe by charging that it was the duty of the servant to have carefully examined the

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MASTER AND SERVANT—Continued.

approaches and the steps before obeying the command of the foreman. *Idem.* 322

5 Question for Jury.—The care which parties are required to use in the discharge of their respective duties varies so much with the situation of the parties and the circumstances of each particular case that it is the policy of the law to leave questions of this kind to the jury. *Idem*.....322

6. Saw Mill—Personal Injury—Employe—Fellow Servant.—Plaintiff, who was employed in a sawmill in setting the "dogs" in a log to hold it firmly on the saw carriage, was not a fellow servant with one whose duty it was to inspect the logs before they came to the carriage for the purpose of removing spikes driven in the logs for rafting, and if the negligence of such person resulted in the breaking of a saw, injuring plaintiff, he might recover. Covington Sawmill & Mfg. Co. v. Clark.....461

7. Petition—Alternative Allegations.—In an action for injuries received from the breaking of a saw the petition was not defective for averring in the alternative that defendant was guilty of negligence either in running the saw too rapidly, or because of some iron being in the logs, or because of some defect in the saw, and that defendant was negligent in not remedying the defect in the saw or timber. *Idem*.....461

8. Cured by Verdict.—Though the averments as to the existence of iron in the log, which, on trial, proved to have been the cause of the accident, were meager, the defect was cured by verdict. *Idem.* 461

9. Negligence of Log Inspector.—If a log, the sawing of which broke a saw and injured on employe, had been inspected by the employer's inspector, and he failed to exercise such care as is ordinarily exercised by ordinary careful persons under the same circumstances, and the injury resulted solely from such want of care, plaintiff was entitled to recover. *Idem*.....461

10. New Trials.—Rulings on motion for new trial will not be disturbed unless it appear that the discretion of the court has been abused. Hurt v. L. & N. R. R. Co.....545

11. Discretion of Court.—Where the trial judge is convinced that the verdict has been returned either under a misunderstanding on the part of the jury, or because of prejudice or other undue influence, it is his duty to set it aside. *Idem*.....545

12. Negligence—Instruction—Plaintiff mounted a moving car and attempted to set the brake, when "something slipped or gave way," and he fell in front of the car. There was evidence in an action for the injury that he was using a brake stick, contrary to the rules of the company. HELD, that it was proper

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MASTER AND SERVANT—Continued.

not to submit to the jury the question of negligence in delivering the car at a dangerous rate of speed, since, if the brake was in proper condition, the speed could not have caused the injury, and, if defective, the speed was immaterial. *Idem*.....545

13. Evidence Scintilla.—A brakeman was giving a brake wheel a hard turn, when "something gave way," and he fell and was injured; and it was his theory that the brake chain was too long, so that it lapped on itself, and when he put the force on, the chain slipped. There was no evidence that the brake was defective, but one witness testified he examined a car which had been pointed out by "some railroad employes" on the following day, and that one of the links of the brake chain was pressed together. HELD, that there was a scintilla of evidence, requiring the case to go to the jury. *Idem*.....545

14. Setting Aside Verdict.—A verdict is not to be sustained upon a mere scintilla of evidence, where it is flagrantly against the weight of all the evidence. *Idem*.....545

15. Failure of Proof.—In a servant's personal injury action, where the circumstances show nothing as to the real cause, but leave it to conjecture whether it was the negligence of the master, the fault of the injured servant, or an unaccountable accident, there is a failure of proof. *Idem*.....545

MEASURE OF DAMAGES—

See Contracts, 9.

MISFEASANCE—

See Office, &c., 8.

MUNICIPAL CORPORATIONS. (See Limitation, 1 to 5.)

1. Gas Companies—Exclusive Franchise—Rival Claim—Injunction.—Where the exclusive franchise to furnish light to a city has been granted to a gas and electric light company, and another company also claims such right, thereby casting a cloud on the title of the first company to the right claimed by it, injunction to restrain the second company from setting up such exclusive right is the proper remedy, though the first company is not in possession of the streets. People's Electric Light & Power Co. v. Capital Gas & Electric Light Co.....76

2. Pleading—Champerty.—In an action by a gas and electric light company, claiming that the exclusive franchise to light the streets had been granted to it, to restrain another company from setting up a claim to a similar exclusive right, a plea of champerty by defendant, on the ground that it had the exclusive right to furnish light at the time the plaintiff's franchise was granted, was demurrable. *Idem*.....76

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MUNICIPAL CORPORATIONS—Continued.

3. Defenses—A plea denying that the sale of the franchise to appellant was advertised, or that bids were publicly received therefor, or that the franchise was sold to appellant as the highest and best bidder, stated a good defense. *Idem*.....76

4. Charter Rights.—Where the charter of a gas company did not authorize it to furnish any other light than gas, and it had no facilities for so doing, a franchise granted by a city to such company, giving it the exclusive right to use the streets to furnish gas and "other illuminating light," was void as to 'other illuminating light." *Idem*.....76

5 Deed—Construction.—A city contracted to deed its gas plant and grant an exclusive franchise to furnish gas and other light to a company whose charter gave it no right to furnish any light but gas. The deed was made to an assignee of this company, and the assignee's charter provided that it should furnish gas and electric light. The deed imposed no obligation on the grantee to furnish any other light than gas. HELD, that the deed did not give the grantee an exclusive right to furnish electric light. *Idem*. 76

6. Contracts—Effect.—Contracts made by the grantee with the city with reference to furnishing electric lights, which did not impose on the company any duty to furnish such light, did not give the company an exclusive right to furnish electric light. *Idem*. 76

7. Enlarging Franchise.—Under Constitution, section 164, providing that before granting any franchise for a term of years, a city shall receive bids therefor and award the same to the highest and best bidder, a city can not enlarge a franchise already granted, except by award to the highest and best bidder. *Idem*. 76

8. Right of Way—Street Improvement.—A strip of land appropriated to use by a railroad as a right of way, is a "lot" within the meaning of the statute governing street improvements and is liable to an assessment for a street improvement. Figg v. L. & N. R. R. Co.....135

9. Power to Create Offices.—Under the Constitution and its charter, the city of Lexington has no power to create any office or officers other than those provided for therein. Lowery v. City of Lexington. 157

10. Invalid Delegation of Power by Statute.—An ordinance of a city providing for the construction of a sewer system, and appointing certain persons to superintend its construction, employ a sanitary engineer, advertise for and receive bids, fixing such re-

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MUNICIPAL CORPORATIONS—Continued.

strictions and limitations as they might determine, not being required to report to the council any bids which, in their judgment, the city should not accept, was an invalid delegation of powers delegated to the council by Kentucky Statutes, 1899, section 3058, giving to the city council of that city the power and authority, by ordinance, to establish, erect, and maintain sewers. *Idem.* 157

11. Liquor Ordinance—Validity.—An ordinance entitled an ordinance prohibiting the dispensing of spirituous liquors during certain hours, closing saloons, coffee houses, and like places of business during such period, and requiring the removal of obstructions to the interior view from saloons, coffee houses, or like places of business, is not repugnant to Kentucky Statutes, section 3059, providing that no ordinance shall embrace more than one subject which shall be expressed in the title. McNulty, &c. v. Toof, &c.....202

12. Same.—Under Kentucky Statutes, section 3058, conferring power on certain cities to regulate the selling or giving away of spirituous liquors by any person within the city other than those duly licensed, and to pass such ordinances as may be expedient in maintaining the peace, good government, health, and welfare of the city, an ordinance prohibiting the dispensing of spirituous liquors between certain hours of the night, requiring the closing of saloons, and the removal of obstructions from the interior view of saloons, is authorized. *Idem*..202

13. Druggists.—A provision in the ordinance prohibiting druggists from dispensing spirituous liquors between certain hours of the night is invalid, a druggist not being permitted to dispense liquors at any time as a drink. *Idem*.....202

14. Wholesale Liquor Dealers.—The ordinance, in prohibiting wholesale liquor dealers from dispensing liquors during certain hours, is invalid. *Idem.* 202

15. Entering Saloon.—An ordinance, in declaring that the entrance or exit of any person from any saloon during the hours specified that same should be closed should be *prima facie* evidence of its violation is invalid, as an attempt to legislate on the weight and effect of evidence. *Idem*.....202

16. Invalid in Part.—Where the invalid provisions of an ordinance can be eliminated without affecting the remainder, it will not be invalid *in toto*. *Idem*.....202

17. Penalties.—In an action for the penalty for violating an ordinance requiring the closing of saloons, an answer controverting the validity of the ordinance because it had not been published

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MUNICIPAL CORPORATIONS—Continued.

as required by Kentucky Statutes, section 3045, may be filed, and the question of fact investigated. *Idem.* 203

18. Recording Ordinances.—Under Kentucky Statutes, section 3063, providing that the general council shall cause all ordinances passed by them to be fairly recorded in the journal of proceedings, an answer in an action for the penalty for violating an ordinance averring that the ordinance was not recorded in the journal on the days it passed the respective houses is insufficient, as it does not aver that the proceedings of the board were not recorded at all. *Idem*.....203

19. Electric Plant—Municipal Ownership—Defective Appliance.—Where a municipal corporation owned and operated an electric light plant, the degree of care required in the maintenance of its wires for the distribution of electricity was not the same as that required with regard to the safe condition of its streets, but it was bound to know whether its appliances were reasonably safe, and to keep them in a reasonably safe condition. City of Owensboro v. Knox's Admr.....451

20. Negligence—*Prima Facie* Case.—Where plaintiff's intestate came in contact with a live electric wire, which conducted an electric current to a short post near a sidewalk, and intestate was injured either by the imperfect insulation of the wire, or by the negligence of the owner of the electric plant in failing to keep other wires from coming in contact with the wire in question, without intestate having any reason to suspect the dangerous condition of the wire, such circumstances establish a *prima facie* case of negligence. *Idem*.....451

21. Trial—Verdict—Harmless Error.—Where, in an action for injuries, the verdict in favor of plaintiff barely compensated him for the injury resulting to his intestate, and was supported by the evidence without regard to the testimony of a particular witness, improper argument of plaintiff's counsel with regard to such witness was harmless. *Idem*.....451

22. Public School Building—Negligent Maintenance—Liability of City.—A municipal corporation, having power to acquire and hold real estate, is exempt from liability for damages for personal injuries sustained by negligence in the maintenance of such property owned by it, which is in the possession and control of a common school district and used for school purposes, the building being owned not for private or municipal uses, but for a public purpose. Ernst v. City West Covington. 550

23. Street Sprinkling—Public Purpose—Taxation.—The sprinkling of city streets, being necessary to preserve the public health and

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MUNICIPAL CORPORATIONS—Continued.

comfort, is a public purpose; and hence an ordinance levying a tax for street sprinkling purposes is not unconstitutional, under Const., section 171, providing that taxes shall be levied and collected for public purposes only. Maydwell, &c. v. City of Louisville. 885

NEGLIGENCE—

See Master, &c., 12; Mun. Corp., 19, 20, 21, 22; R. R., 15, 16; Removal of Causes, 4; Telegraphs, 2, 3, 4; Automobiles, 3.

NEW TRIALS—

See Master, &c., 10.

NONRESIDENTS. (See Limitation, 8.)

1. Process—Substituted Service.—Civil Code, section 51, subdivision 6, providing that "in actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State," substituted service may be had, authorizes substituted service on a non-resident individual. Guenther v. American Steel Hoop Co.....580
2. Presumption.—As non-residents are presumed to be without the State, it is not necessary to show, in order to sustain substituted service on a non-resident as authorized by Civil Code, section 51, subdivision 6, that he was at that time outside the State. *Idem.* 580
3. Service on Agent.—Civil Code, section 51, subdvision 6, providing that, in the case of non-residents doing business within the State, substituted service may be made upon their managers, agents, or persons in charge of such business, is not invalid as providing for insufficient notice. *Idem*.....580
4. Constitution.—Civil Code, section 51, subdivision 6, authorizing substituted service on non-residents, does not violate Constitution of the United States, article 4, section 2, providing that citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. *Idem*.....580
5. Answer—Waiver.—A denial in an answer that defendant is a non-resident on whom substituted service is authorized by Civil Code, section 51, subdivision 6, is immaterial, as answering waives the question of sufficiency of service. *Idem*.....580
6. Conclusion of Law.—In a suit for the price of goods, a denial that defendant is indebted in any sum is a conclusion of law. *Idem.* 580
7. Promise to Pay—Denial.—In a suit for the price of goods, a denial that defendant agreed or promised to pay the money sued

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NON-RESIDENTS—Continued.

for constitutes no defense, where allegations in the petition that the goods were sold and delivered at defendant's special instance and request, and at prices set out in an itemized account filed therewith, are not controverted. *Idem*.....580

8. Counterclaim—Contractual Obligation.—In a suit for the price of goods, defendant alleged in his counterclaim for failure to deliver in time that, though the incorporation of plaintiff had been effected subsequent to the breach by his original vendor, yet it had been previously agreed upon by the original vendor and others; that such vendor had closed its plant for the purpose of taking stock, with a view to the consolidation, and that plaintiff had been incorporated for the purpose of taking the contracts, assets, business, good will, and liabilities of the consolidating firms, and did take, pursuant to the agreement, all the contracts of the original vendor, including defendant's, and undertook to carry the same out; that plaintiff took possession and control of the original vendor's plant, and agreed to carry out the contract with defendant; and that plaintiff's incorporation was, in part, to enable it to do so. HELD, demurrable, as not alleging enough to show that plaintiff had assumed a contractual obligation to defendant, which had ripened into a liability before plaintiff came into existence. *Idem*....580

9. Action—Attachment—Non-Resident—Jurisdiction.—Civil Code, section 194, provides that a plaintiff may at or after the commencement of an action, have an attachment against the property of the defendant as a security for the satisfaction of any judgment he may recover against a defendant who is a non-resident of the State. HELD, that where a non-resident defendant had property within the State, a circuit court of a county where such property was located acquired jurisdiction of the defendant to the extent of the value of such property by the levy of an attachment thereon. Brand v. Brand, &c.....785

10. Pleading—Appearance.—Where a non-resident sued by attachment appeared and demurred to the petition for alleged want of jurisdiction of the court, and, after his demurrer was overruled, he appeared and pleaded to the merits, the court thereby acquired jurisdiction of his person. *Idem*.....785

NONUSER—

See Roads, &c., 2, 3, 4, 5.

OFFICE AND OFFICER. (See Mun. Corp., 9.)

1. Police Judge—Vacancy—Appointment—City Council—Governor—Powers.—Constitution, section 152, provides that vacancies in all offices for the State at large, or districts larger than a county,

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OFFICE AND OFFICERS—Continued.

shall be filled by appointment of the Governor, and that all other appointment shall be made as prescribed by law. Kentucky Statutes, section 3551, declares that if a vacancy shall occur in any office which the city council has the right to fill by appointment, such vacancy may be filled by it for the remainder of the unexpired term; and section 3552 provides that if a vacancy shall occur in any elective office, including the office of councilman, such vacancy shall be filled by the council, subject to the provisions of the Constitution. Section 3758 requires the Governor to issue commissions to certain officers, and provides that should a vacancy in any of such offices occur where there is no provision of law for filling the same, the vacancy shall be filled by the Governor. HELD, that since Kentucky Statutes, section 3510, provides that the office of police judge of a city may be filled by election or by appointment of the council, as it may determine by ordinance, where a vacancy occurred in the office of police judge the city council had authority to fill the same under sections 3551, 3552. Traynor v. Beckham. 13

2. Commission—Under Kentucky Statutes, section 3758, providing that police judges shall have commissions issued to them by the Governor, where a police judge was legally appointed by a city council to fill a vacancy, the Governor was under a ministerial duty to the appointee to issue such commission. *Idem*.....13

3. Ministerial Duties—Mandamus.—Where the Governor of a State refused to perform the ministerial duty of issuing a commission to a police judge legally appointed by a city council, as required By Kentucky Statutes, section 3758, mandamus was maintainable against the Governor to compel the issuance of such commission. *Idem*. 13

4. County Judge—Salary.—Where the fiscal court failed to fix the salary of the county judge for his entire term before his election or qualification, as it is required to do by Constitution, sections 161, 235, it may fix such salary thereafter. Butler County v. James. 575

5. Change During Term.—Constitution, section 161, provides that the compensation of county officers shall not be changed after their election or during their term, and section 235 provides that the salaries of public officers shall not be so changed. HELD, that where the fiscal court appropriated a sum of $500 for the salary of a county judge for the first year of his term, it had no power by a subsequent order to allow him a different amount. *Idem*...575

6. Void Order.—Where the fiscal court of a county attempted to change

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OFFICE AND OFFICERS—Continued.

the salary of a county judge during his term, which it was prohibited from doing by Constitution, sections 161, 235, its orders in that behalf were void, and no defense to an action by the judge to recover his full salary. *Idem*.....575

7. Estoppel.—Where the salary of a county judge was illegally reduced during his term, his acceptance of the amount allowed did not estop him from claiming the remainder. *Idem*.....575

8. County Clerk—Misfeasance—Indictment—Sufficiency.—An indictment of a county clerk for unlawfully issuing a license to sell liquor in a local option precinct, which fails to aver that his action was from a corrupt motive or fraudulent, or that he knew at the time that it was unlawful for him to issue the license, is insufficient. Commonwealth v. Wood.....748

ORDINANCES—

See License Tax, 2; Pool Rooms; Mun. Corp.

PARTIES TO ACTIONS—

See Admrs., 2.

PARTNERSHIP FUNDS—

See Banks, &c., 9, 12, 15.

PATENTS—

1. Location—Corners—Course and Distance.—Where, in construing the description in a deed, the corners are established, they must control the course and distance. Creech, &c. v. Johnson, &c..441

2. Uncertain Calls—Where the terms of a patent from the State are uncertain or doubtful, it is to be strictly construed against the grantee. *Idem*.....441

3. Stake Near Gap.—Where a call in a State patent to land is for a stake "near Cumberland Gap," the language can not be construed as meaning in Cumberland Gap. Creech v. Johnson, &c. 441

4. Construction.—Where a call in a patent from the State placed a certain corner "near Cumberland Gap," but the placing of the corner in accordance with the call would have caused the patent to embrace a town with the county courthouse and public grounds, the word "near" was too indefinite to justify a construction of the patent in accordance therewith, so as to sustain such a result. *Idem*. 441

5. Notoriety of Corner.—Where the calls of a patent were for 664 poles, 8,320 poles, 3,200 poles and 3,150 poles, and one of the calls established a corner "near Cumberland Gap," considering the length of the lines of the patent and the notoriety of Cumberland Gap, the location of a corner within five miles of the gap

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PATENTS—Continued.

might be reasonably spoken of as near Cumberland Gap. *Idem.* 441

6. Lines Running out of the State.—Where the calls of a patent from the State of Kentucky were such that the patent embraced lands in Tennessee and Virginia, in the absence of marked lines or corners, it was proper to adopt that location of the patent which gave about the quantity of land called for by reversing the lines from the beginning corner. *Idem*.....441

PENAL ACTIONS—

1. Indictment—Dismissal—New Action—Limitation.—Statutes, 1899, section 1138, provides that an election or proceedings to recover a penalty for violation of the criminal laws shall be commenced within one year after the right to such penalty accrues, and not thereafter. Criminal Code, section 159, makes it the duty of the circuit judge, on quashing an indictment on grounds specified in section 158, to order the case resubmitted; and section 160 declares that unless a new indictment is found by the next grand jury, the defendants shall be discharged unless the court for cause shall otherwise order. HELD, that where an indictment for violation of the local option law was dismissed more than a year after the commission of the offense without an order for resubmission, a subsequent civil action brought to recover a penalty for the same offense was not a continuance of the original proceeding, but a new action, and barred by limitations. Commonwealth v. Elkins. 303

PEREMPTORY INSTRUCTIONS—

See Banks, &c., 1.

PHYSICIANS—

1. Registry—Births and Deaths—Duty of Physician—Title of Act—Sufficiency.—The title of an act, "An act to provide for the registration of marriages, births and deaths" (Acts 1873-74, p. 13, chap. 134), is sufficient to authorize the provision in the act requiring physicians to keep a registry of births and deaths at which they have professionally attended, and to deposit a copy in the county clerk's office. Commonwealth v. McConnell.....358
2. Constitutionality.—Acts 1873-74, p. 13, chap. 134, is not unconstitutional because requiring physicians, without compensation, to keep a registry of births and deaths at which they have attended professionally, and to deposit a copy in the county clerk's office; this being within the police power. *Idem*.....358
3. Indictment.—An indictment against a physician under Acts 1873-74, p. 13, chap. 134, for failure to keep a registry of births

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PHYSICIANS—Continued.

and deaths at which he has attended professionally, and to deposit a copy in the county clerk's office, is defective in not charging that he ever attended at any birth or death. *Idem*..358

4. Allegations.—The allegation of an indictment under Acts 1873-74. p. 13, chap. 134, requiring physicians to keep a registry of births and deaths at which they have attended, professionally, that defendant "is a physican," speaks from the time of the indictment, and is not a sufficient allegation that he was a physician during the year then ended, for which it was charged he failed to do his duty. *Idem*.....358

PLEADING. (See Non-Residents, 5 to 9; Wills, 10; Removal of Causes, 2, 5; Building & Loan, 1; Master, &c., 7; R. R., 2, 9; Taxation, 6.

1. Withdrawal of Answer—Effect.—An order allowing a defendant to withdraw an answer and file another merely eliminates the pleading as a pleading tendering an issue to be tried, and does not authorizing him to take it off the files. Wyles, Commissioner v. Berry. 377
2. May be Used as Evidence.—Where defendant is allowed to withdraw his answer in an action on a bond, pleading that he had signed it as surety only, and to file one pleading *non est factum*, the original answer, if sworn to by defendant, or if authorized and known by him to have been made, may be proved against him as an admission. *Idem*. 377
3. Evidence in an action against the principal on a bond for money loaned by order of court, plaintiff may show the financial condition, at the time of the loan, of a third person for whom the money was actually borrowed. *Idem*. 377

PLEA IN BAR—

See Limitation, 8.

POLICE COURTS—

See Cr. Law, 12.

POOL ROOMS—

1. Appeal—Clerical Misprision—Dismissal—Correction—Subsequent Appeal.—Where an appeal is dismissed because of a clerical misprision in the style of the cause, and, on being corrected as indicated by the dismissal, an appeal is again taken, the subsequent appeal will not be dismissed, as being the same appeal previously dismissed. City of Louisville v. Wehmhoff, &c....812
Same v. Alvey, &c.....812
Same v. Pirtle.....812
Same v. Smith.....812

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POOL ROOMS—Continued.

2. Cities—Ordinances—Legality—Local Law—Constitutionality.—Kentucky Statutes, 1899, section 2922, providing that the legality of an ordinance of a city of the first class may be tested by the city by an appeal to the Jefferson circuit court, and then to the court of appeals, as other cases in the circuit court are appealed, and referring to Louisville, in Jefferson county—the only city of the first class—is not repugnant to Const., section 59, forbidding local laws regulating the jurisdiction of courts. *Idem*. 812

3. Prosecution—Name of City.—Const., section 123, providing that all prosecutions shall be in the name and by the authority of the Commonwealth of Kentucky, does not preclude a prosecution in a municipal court, in the name of the city, for the violation of an ordinance, authorized by Kentucky Statutes, 1899, section 2917, providing that all fines realized in such court, whether the prosecution be in the name of the city of the Commonwealth, shall be paid into the city treasury. *Idem*.....812

4. Fines—Limit—Common Law Offenses.—Under Kentucky Statutes, 1899, sections 2742, 2783, conferring on cities of the first class power to pass such ordinances for municipal purposes as they may deem proper, not in conflict with the Constitution of the United States and Kentucky, and section 2782, providing that the council shall have power to pass ordinances imposing fines not exceeding $100 for any designated misdemeanor provided for by the general laws of the Commonwealth, but, where the general statutes impose a fine not exceeding $100, such fine may be imposed by ordinance, the council may by ordinance punish acts which are offenses at common law, as section 2782 was not intended to restrict the council's powers in defining what should be offenses within the city, but defined its authority in prescribing the limits of punishment. *Idem*.....812

5 Title of Ordinance.—Louisville City Ordinance, entitled "An ordinance to prevent the operation of pool rooms in the city of Louisville," and providing for the punishment of the operator of the pool room, his servants or employes engaged in operating it, the owner or controlling agent of the building, who knowingly lets it for the purpose, the telegraph, telephone, or messenger company knowingly transmitting messages to enable the selling of pools, and the person who buys or has possession of the tickets, is not repugnant to Kentucky Statute, 1899, section 2777, providing that no ordinance shall embrace more than one subject, and that shall be expressed in its title. *Idem*.....812

6. Horse Races—Information—Carrier.—Louisville City Ordinance, section 4, making it unlawful for any telegraph company to

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POOL ROOMS—Continued.

furnish to any owner, agent, or employe of any pool room maintained in the city any communication concerning any horse races in or out of the city is not invalid as an authorized interference with the legitimate business of a common carrier to contract to deliver messages. *Idem*.....812

7. Warrant—Amendment.—A warrant charging a violation of an ordinance to prevent the operation of pool rooms should not be dismissed because the ordinance specifies several offenses, as it may be amended so as to apprise the accused of the provision he is charged with violating. *Idem*.....812

ON PETITION FOR REHEARING.

8. Rehearing—Valid Argument.—A contention on the hearing of an appeal that the offense created by a certain ordinance was not an offense at all did not estop the one making it from arguing on the rehearing that the ordinance was void because violative of Const., section 168, forbidding the passage of ordinances fixing less penalties than those fixed by the statute for the same offense. *Idem*. 812

9. French Pools.—Conceding that an ordinance prohibiting and punishing the operation of pool rooms was broad enough to include French pools, which has been construed as a contrivance used in betting, within Kentucky Statute, 1903, sections 1960-1961, which fix a greater penalty than that fixed by the ordinnance for setting up and operating such contrivances, and hence is, as to French pools, void, because violative of Const., section 168, forbidding the enactment of ordinances prescribing less penalties than fixed by statute for the same offense, yet it is void only as to that class of pool selling, and is valid in other particulars prescribed therein, such as the penalties affixed to the acts of having pool tickets in possession, and furnishing telegraphic messages to operators, knowing that they are to be used to further the business of pool selling, which are not within the statutory prohibition. *Idem*.....812

10. Gaming.—The act of pool selling or betting by buyers on pools is not a game, within Kentucky Statutes, 1903, section 1978, prescribing a penalty for those suffering any game in which any property or money is bet, won, or lost in any house or in premises in their occupation. *Idem*.....812

11. Police Power.—A city ordinance forbidding the transmission to a pool room operator of messages intended to be used in business of pool selling in the city is a valid exercise of the police power of the State. *Idem*.....812

12. Interstate Commerce.—An ordinance forbidding transmission of telegraphic messages to pool rooms is not an unconstitutional

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POOL ROOMS—Continued.

regulation of interstate commerce, though the telegrams come from another State. *Idem.* 812

PRIZE FIGHTING—

1. Evidence Examined.—Evidence examined, and HELD to show that a fight advertised to take place between certain persons would, if permitted, constitute a prize fight. Commonwealth v. McGovern. 212
2. Dividing Reward.—The fact that the reward is to be equally divided between the combatants in a prize fight does not legalize the transaction. *Idem.* 212
3 Use of Gloves.—The use of gloves by combatants in a prize fight will not make the contest any less a violation of the statute. *Idem.* 212
4. Equity—Power to Enjoin.—Kentucky Statutes, 1899, section 1289, which provides that it shall be the duty of "all judges of courts . . . on being informed . . . that such a fight (prize fight is about to take place . . . to suppress and prevent the same, and . . . in order to suppress or prevent the same they shall exercise all the powers vested in them for the prevention of crime," authorize a court of equity, in a suit by the Commonwealth, to enjoin one from permitting the holding of a prize fight on his premises, on the ground that such a use of his property will constitute a public nuisance, though it can not grant an injunction against the principals in the contemplated prize fight, nor those connected with them as managers, trainers, &c., because the process of the criminal courts is adequate to prevent the fight by the arrest and prosecution of the parties concerned. *Idem*.....212

PROCESS—

See Non-Residents, 1, 2, 3, 4.

PROHIBITION WRIT OF—

See Ferries, 3.

PROMISE TO PAY—

See Limitation, 2.

PUNITIVE DAMAGES—

See Telegraphs, 1.

RAILROADS. (See Taxation, 6, 7.)

1. Lease of Lines—Liability of Lessor—Injury to Servant.—Where a railroad company, under valid legislative authority, leases its lines to another road, it is not liable as an employer for injuries caused to employees of the lessee through the lessee's

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RAILROADS—Continued.

negligence. Swice's Admx. v. Maysville & B. S. Ry. Co. &c...253

2. Indivisible Contract—Splitting Cause of Action—Waiver.—Two suits on the same contract were begun at nearly the same time in the same court, in both of which defendant appeared and filed demurrers, which were heard together; only one opinion being rendered in both cases. Defendant answered, and both causes proceeded for several years; defendant at no time making objection to the splitting of the cause of action. After a judgment in one suit, and some five years after the suits were begun, defendant pleaded that judgment in bar in the other suit; claiming that the cause of action had been split. HELD, that defendant had waived its right to object to the splitting of the cause of action. Louisville Bridge Co. v. L. & N. R. R. Co.....258
Pittsburg, C. C. & St. L. R. R. Co. v. Same.....258

3. Action for Tolls—Evidnce—Tables.—In a suit by a railway company to recover excessive tolls charged by defendant bridge company, the railway company had no means of knowing the amount of freight that had passed over the bridge, except by the waybills and transfer slips which it had preserved, and these were very numerous. HELD, that a tabulated statement of the facts shown by the bills and slips was admissible in evidence on being sworn to as correct by the officer of the railway company under whose supervision the statement was prepared, and after an offer to allow the opposing party to examine the original papers. *Idem.* 258

4. Secondary Evidence.—The waybills and transfer slips were not objectionable as secondary evidence.—*Idem.* 258

5. Data.—A plaintiff in an action on contract can not recover where there is no data from which the amount to which he is entitled can be ascertained, though it is clear that he is entitled to recover something. *Idem.* 258

6. Engines—Setting Fires.—In connection with other evidence to show that plaintiff's house was set on fire by an unknown passing engine, it may be shown that a few days before a fence as far from the track as the house took fire from sparks from a passing engine. Mills v. L. & N. R. R. Co.....309

7. Burden of Proof.—The court should not instruct on burden of proof, but simply frame the instructions so as to indicate on whom it lies. *Idem.* 309

8. Spark Arresters—Instructions.—Under Kentucky Statutes, 1899, section 782, requiring railroad companies to equip locomotives with appliances that will prevent as far as possible, sparks of fire escaping, it is not enough for them to put on safe and approved fire arresters, but they must provide the best and most

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RAILROADS—Continued.

effectual spark arrester known to science and of practical use, properly adjusted, that will prevent as far as possible sparks escaping. *Idem.* 309

9. Personal Injuries—Petition Indefinite—Bill of Particulars,—Where, in an action against a railway company operating a trunk line through a certain county, with perhaps fifty miles of track therein, over which in the course of twelve months thousands of trains passed at all hours of the day and night, and operated by hundreds of different employes, the complaint alleged that within the last twelve months the defendant, while engaged in operating its road in the county, negligently injured plaintiff by running its engine and train over him, the court had the power to require plaintiff to furnish a bill of particulars averring the time when and place where the accident occurred, whether during the night or day, and whether inflicted by a freight or passenger train, on defendant showing by affidavit or otherwise that it did not have such information, nor reasonable means of obtaining it; but the court could not require plaintiff to give the number of the train producing the injury, or the names of the employes in charge thereof. Bogard v. Illinois Cent. Ry. Co..429

10. Initial Carrier—Acceptance from—Ratification.—The acceptance by a railroad company of cars of freight from the initial carrier thereof does not operate as a ratification of an oral contract between the initial carrier and the consignor to carry the goods for less than the usual rate. Thomas v. F. & C. Ry. Co. 879

11. Special Contract—Usual Rate.—Where a common carrier accepts freight without special contract as to the rate to be charged, the law implies an undertaking to charge the usual rate. *Idem.* 879

12. Lien—A carrier has a lien on freight transported by it for the usual charges of such transporation. *Idem*.....879

13. Advances.—A common carrier's lien for charges of transportation includes charges which it may have advanced to a preceding carrier. *Idem.* 879

14. Damages.—A common carrier's lien for transportation charges is not affected by the fact that the previous carrier has been in default by reason of damage to the goods. *Idem*.....879

15. Negligence.—In the absence of a special contract to deliver freight at a point beyond its line, a common carrier is not liable for negligence occurring after its delivery of the freight to a connecting carrier. *Idem.* 879

16. Duty to Trespassers.—A railroad company owes no duty to trespassers on its tracks at places not frequented by the public by

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RAILROADS—Continued.

right or permission until their peril has been discovered. Goodman's Admr. v. L. & N. R. R. Co.....900

17. Killing Child—Negligence—Evidence—Sufficiency.—In an action against a railroad company for the death of a child on its track in a cut seven or eight feet deep and about 230 yards from a crossing, evidence that it was possible for the engineer to have discovered the child when the train was at the crossing was insufficient to justify a finding that the engineer was negligent in not then discovering the child, where the brakeman testified that he was in the cab; that, after passing the crossing, he saw an object on the track about 150 yards ahead, which looked like a piece of paper, but that when the train had approached within thirty feet of the object he discovered that it was a child lying between the rails. *Idem.* 900

18. Licensee—Use by Pedestrians.—Where it was shown that a railroad track in a deep cut was fenced on both sides, and was inclosed by iron cattle guards at the crossings, evidence of the mere occasional passage of unauthorized pedestrians on the track there with the knowledge of the company was not sufficient to convert a trespasser there to a licensee. *Idem*.....900

19. Freight Rates—Through Rates—Local Rates.—Const., section 215, providing that all railway companies shall transport freight of the same class for all persons from and to the same points and upon the same conditions, in the same manner, and for the same charges, does not prohibit a railway company from charging a through rate which is less than the sum of the local rates between the two points. Southern Ry. in Ky. v. Com...907

20. Discrimination.—A railroad company issued a bill of lading agreeing to transport freight to a point which was several miles from the nearest station on its line. At this station a person who had always made it a practice to carry freight between the station and the point to which the goods in question were consigned took charge of the goods, and carried them to the consignee, with whom he had a special contract as to the price to be charged for carrying such goods. Deducting this price from the through rate charged by the company, the remainder was less than the local rate from the point of shipment to the station. Const., section 215, provides that all railways shall transport freight of the same class from and to the same points for the same charges. HELD that, notwithstanding the railroad company had no express contract with the person who carried the goods from the railroad station to their destination, nevertheless it was a through shipment, for which the railroad company was entitled to charge a sum less than the sum of the local rates. *Idem.* 907

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RATIFICATION—

See Banks, &c., 3.

REMOVAL OF CAUSES—

1. Foreign Corporations—Compliance with State Law—Effect.—A compliance by a foreign railroad corporation with Constitution, section 211, and Kentucky Statutes (1899), section 841, the former providing that such corporations shall not be entitled to the right of eminent domain, or have power to acquire a right of way or real estate, until they shall have become bodies corporate in accordance with the laws of the Commonwealth, and the latter prescribing the manner of such incorporation, does not render the corporation a citizen of the State in such sense as to deprive it of the right to remove to the Federal court actions instituted against it by a citizen of the State. Davis' Admr. v. C. & O. R. R. Co.....144
2. Joinder of Resident—Amended Petition. In an action against a foreign railroad corporation, an amended petition, tendered after the filing by defendant of a petition for removal of the cause to the Federal court, making a domestic corporation, original defendant's lessor, a party, came too late to prevent the removal. *Idem.* 144
3. Pleading—Construction.—An allegation in a petition that plaintiff's intestate was killed "at or near" a private crossing should be construed to mean that she was killed at a place on the track other than the crossing. *Idem*.....144
4. Signals—Negligence.—A failure to slacken the speed of a train, or to give signals at an approach to private crossings, is not negligence. *Idem.* 144
5. Private and Public Crossings—Signals.—In an action against a railroad for injuries at a private crossing, near a public crossing, where there was no averment that signals usually given on the approach of trains to the public crossings could have been heard at the private crossing and the distance between the crossings was not given, but a bare statement that they were "near" together, the question of defendant's negligence in failing to give signals at the public crossing, on which plaintiff could rely, was not raised. *Idem*.....144
6. Duty to Trespasser.—Those in charge of a train owe a trespasser on the tracks of the railroad no duty, except to use reasonable care to save him after discovering his peril, and, if injured, he can not rely for a recovery against the railroad on alleged negligence in failing to give signals on approach to either a private or public crossing. *Idem*.....144
7. Joining Servants of Railroad Company—Necessary Pleading.—In order to prevent a removal of an action for injuries against

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REMOVAL OF CAUSES—Continued.

a foreign railroad company to the Federal court, by joining as defendants resident servants of the railroad in charge of the train causing the injury, the petition must state a good cause of action against the servants so joined. *Idem*.....145

RENTS—

See Admrs., 6.

RES JUDICATA—

See Judgments, 1; Trust Estates, 9.

RIGHT OF WAY—

See Mun. Corp., 8.

ROADS AND PASSWAYS. (See Counties, 19.)

1. Obstruction—Fines—Justices' Courts—Jurisdiction.—Kentucky Statutes, 1899, section 4335, declares that any person who shall willfully obstruct a public road shall be fined for each offense not less than five dollars nor more than fifty dollars, to be recovered in like manner as fines against contractors, and shall be liable for damages, to be recovered in any court having jurisdiction of the amount claimed. Section 4316 confers on the quarterly court exclusive jurisdiction of all breaches of contractor's bonds. HELD, that the words "to be recovered in like manner as fines against contractors" in section 4335 had reference merely to the method of procedure, and that such sections did not impliedly repeal sections 1093 and 1141, conferring jurisdiction on justices of the peace to try the offense of willfully obstructing a public road. Cin., N. O. & T. P. Ry. Co. v. Baughman. 479
2. Cities—Non-user.—Where a city failed for more than seventeen years to exercise any of the governmental functions granted to it by an act of incorporation, the rights and powers thereby granted were forfeited by non-ueser. *Idem*.....479
3. Adverse Use.—A private passway can be acquired by prescription only by adverse user by the claimant or his predecessor for at least fifteen years. Riley v. Buchanan.....625
4. Permissive Use—Estoppel.—An owner of realty, who allows the public to use it as a highway, under a notorious claim of right, for a long period of years, is estopped from denying a dedication to the public. *Idem*. 625
5 Implied Dedication.—A dedication of a highway may be impliedly accepted by long continued user by the public. *Idem*.....625

ROAD SUPERVISORS—

1. County Judge—Eligibility—Kentucky Statutes, 1899, sections 4306, 4339, relative to roads, vest the control of roads in the fiscal

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ROAD SUPERVISORS—Continued.

court. The general scheme there provided is for the appointment of a supervisor, whose duty it is to report to the county judge under whose immediate control he is placed, and in whose court he must execute bond, and from whose court warrants may issue for violations of duties by the supervisor. In many instances the concurrent action of the county judge and supervisor is required, and in case of a vacancy in the supervisor's office the county judge may appoint some one to fill it until the next term of the fiscal court. HELD, that it was contemplated by the statute that the county judge and supervisor should be different persons, although, under section 4315, it is provided that the fiscal court, instead of appointing the supervisor, may authorize the county judge to let out the working of roads, the other duties of the office being discharged by road overseers, in which case, however, the county judge acts as judge, and not as supervisor, and is entitled to no additional compensation for his services. Daviess County, &c. v. Goodwin.....891

2. Fiscal Court—Authority.—The fiscal court is a body of limited authority, and its action in appointing a county judge as supervisor of roads is void and vests in the judge no right to the office. *Idem*.....891

3. Taxpayer—Right of Action.—A citizen and taxpayer of a county suing for himself and all other taxpayers may, as such, maintain an action to prevent the payment to the county judge of a salary as supervisor of roads, to which office he was illegally appointed by the fiscal court. *Idem*.....891

SALARIES—

See Office, &c., 4.

SALES OF PERSONALTY—

1. Harvesting Machine—Sale on Trial—Warranty.—Where a warranty of a harvesting machine was signed by the buyer merely as an order for the machine that it might be procured for trial, and the real contract for its purchase was made by the parties after the machine arrived, when the notes for the price were executed, and it was then orally agreed by the seller's agent that the machine was warranted to do a certain amount of work per day, the buyer was not limited to the written contract. McCormick Harvesting Machine Co. v. Arnold, &c....508

2. Failure to Return in Reasonable Time.—Where defendants purchased certain agricultural machinery on trial under a warranty that it would do a certain amount of work, which it failed to do, they were bound to offer to return the machine within a reasonable time, and, having failed to make any objection

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SALES OF PERSONALTY—Continued.
thereto for more than three months and until suit for the price, they were estopped to deny liability therefor. *Idem*...508
3. Breach of Warranty—Damages.—Where a contract for the sale of farm machinery provided that the buyer was to test the machine, and, if it did not perform the guaranteed work, he was to return the machine, and be given back notes given for the price, he was not entitled to retain the machine, and, on being sued for the price, claim damages for breach of warranty. *Idem*. 508

SALOONS—
See Mun. Corp., 11 to 20.

SCINTILLA—
See Master, &c., 13, 14.

SECOND CONVICTION—
See Local Op., 2.

SHERIFFS—
See Jailers, 3; Counties, 12.

SITUS OF PROPERTY—
See Taxation, 3, 7.

SPLITTING CAUSES—
See R. R., 2.

STOCKHOLDERS—
See Taxation, 6, 7; Corporations.

STATUTES, CODES CONSTITUTION, &c.

KENTUCKY STATUTES—
Section 84. Fraudulent Assignment.....424
Sections 113, 117a, 118. Attorneys for Commonwealth..... 3
Section 317. Charitable Uses.....104, 677
Sections 411, 412, 415. Commissioner and Receiver.....684
Section 467. Construction of Statutes.....357
Section 470. Contracts.....741
Section 474. Contracts.....378
Section 482. Contracts..... 399
Section 495. Conveyances.....701
Section 500. Conveyances.....607
Sections 547, 573. Corporations.....773, 777
Section 639. Insurance..... 51
Sections 744, 762. Insurance..... 3
Section 841. Foreign R. R. Company.....150
Section 978. Courts.....822

Digitized by Google

STATUTES—Continued.

Section 989. Courts....877
Sections 1079, 1080, 1082. Justices' Courts.... 33
Section 1130. Crimes, &c....420
Section 1138. Crimes, &c....305
Section 1154. Crimes, &c....336
Sections 1284, 1288. Prize Fighting....230
Section 1346. Crimes, &c....841
Sections 1401, 1403. Descent, &c....869, 870
Sections 1707, 1708. Homesteads....602
Section 1730. Fees....530
Section 1795. Railroad Fences....542
Sections 1834, 1840, 1883. Fiscal Courts....180
Section 1906. Gifts, Conveyances, &c....656
Sections 1910, 1911. Gifts, Conveyances, &c....424
Sections 1960, 1861. Gaming....845, 846
Section 1978. Gaming....847
Section 2087. Alienation....248, 350
Sections 2110, 1128, 2197. Marriage....279
Sections 2127, 2148. Husband and Wife....477
Sections 2128. Husband and Wife....662, 667
Section 2132. Husband and Wife....603
Sections 2147. Husband and Wife....655
Section 2226. Jailers....533
Section 2355. Trust Estates....395
Sections 2380, 2417. Drainage....947
Sections 2506. Limitation....670
Section 2514. Limitation....733
Section 2525. Limitation....661, 664
Sections 2742, 2782, 2783. Municipal Corporations....827
Section 2777. Municipal Corporation....832
Section 2917. Municipal Corporations....826
Section 2922. Municipal Corporations....821
Sections 2925, 2980, 2981. Municipal Corporations....887
Sections 3045, 3063. Municipal Corporations....211
Sections 3058. Municipal Corporations....162, 207, 729
Sections 3151, 3155, 3147. Municipal Corporations....531
Sections 3212, 3588, 3605. Municipal Corporations....487
Sections 3510, 3551, 3552, 3758. Municipal Corporations.... 19
Section 3519. Municipal Corporations....822
Sections 4025, 4044, 4050, 4052, 4065. Revenue and Taxation....957
Sections 4020, 4088, 4077, 4086....955
Section 4023. Revenue and Taxation....956
Sections 4077, 4078, 4085. Revenue and Taxation....564
Sections 4105, 4114, 4129. Revenue and Taxation....493

Digitized by Google

STATUTES—Continued.

Section 4203. Revenue and Taxation.....526
Sections 4241, 571, 841. Revenue and Taxation.....183, 952
Sections 4306, 4309, 4310, 4289, 4339, 4345. Roads, &c.....598
Sections 4306, 4312, 4313, 4314, 4315. Roads, &c.....897
Sections 4317, 4318, 4335, 4339. Roads, &c.....898

CIVIL CODE—

Section 19 378
Section 25 .....678, 784
Section 28 781
Section 34 .....663, 670
Section 51 .....184, 584, 587
Sections 54, 57 587
Sections 74, 83 440
Sections 120, 128 607
Sections 124, 126 .....337, 338
Section 181 881
Section 194 790
Sections 217, 340 621
Section 227 390
Section 404 733
Section 432 .....248, 784
Section 477 23
Section 479 810
Section 494 871
Section 518 590
Section 606 .....517, 745

CRIMINAL CODE—

Section 27 124
Sections 27, 28, 33, 74.....333, 334
Sections 158, 159, 160 307
Sections 178, 243 308
Section 240 281
Section 354 4
Section 382 416

KENTUCKY CONSTITUTION—

Section 51 414
Section 110 808
Section 114 180
Section 143 .....823, 824, 862
Section 126 822
Section 152 18
Section 157 34

Digitized by Google

STATUTES—Continued.

Sections 157, 171, 172, 174.....950
Sections 161, 235 578
Section 168 .....829, 845
Section 170 716
Section 174 729
Sections 171, 181.....881
Sections 194, 211.....952

UNITED STATES CONSTITUTION

Art. 2, section 1.....149
Art. 4, section —.....792

UNITED STATES REVISED STATUTES—

Sections 4141, 4192 699
Section 905 792

UNITED STATES BANKRUPT LAW—

Sections 60a, 60b, 57g, 67e, 67a, 67d.....701 706

STREET IMPROVEMENT. (See Mun. Corp., 8.)

1. Ordinance—Necessity of Bids. An ordinance, requiring a contract for construction of streets to be let, after advertising, to the lowest and best bidder, passed pursuant to a charter provision that the council shall by ordinance adopt a uniform system to govern street construction, is binding till duly modified or repealed. Fineran v. Central B. P. Co., &c.....495
2. Requirement of an ordinance for competitive bidding for construction of a street is not satisfied where, as known to the council there is but one bona fide bid. *Idem.* 495
3. Lowest and Best Bidder—Under an ordinance requiring contracts for construction of streets to be let to the "lowest and best bidder," an ordinance providing that a street shall be constructed with a certain material, which can be done by only one party, without placing the work in competition with other like or equally good materal, is void. *Idem*.....495
4. Railroad Right of Way—Liable to Assessment.—A strip of land appropriated to use by a railroad as a perpetual right of way, and which is a lot within the statute governing street improvements, is liable for an assessment for a street improvement. L. & N. R. R. Co. v. Barber Asphalt Paving Co., &c.....856

STREET SPRINKLING—

Mun. Corp., 23.

SUBSCRIPTION TO RAILROADS—

See Counties.

Digitized by Google

SUBSTITUTED SERVICE—
See Non-Residents.

SUNDAY—
See Judicial Sales.

SURETIES—
See Bail Bonds, 2; Contracts, 1 to 5.

SURFACE WATER—
1. Right of Dominant Owner—Use of Public Road.—The right of the owner of property naturally draining on a road to have the surface water flow over the road extends no further than to burden the road with the natural flow of surface water, and does not entitle such owner to collect the water from his and other lands into a ditch, and discharge it on the road at a certain point, and compel the proprietor of the road to there receive it and provide for its disposal. Robertson v. Daviess Gravel Road Company.....913
2. Easement—Use of Ditch.—In an action against the proprietor of a road for allowing a ditch which had carried off surface water from plaintiff's ditch to become filled up, a complaint stating that the county, prior to defendant's acquisition of the road, had kept the ditch clean, but which did not state that it had continued such custom for a sufficient length of time to constitute an easement, nor that defendant or the county had for any length of time suffered the water from plaintiff's ditch to run over the road, shows an easement, if at all, merely to use the ditch alongside defendant's road to receive the water from plaintiff's ditch, and not an easement to have the ditch kept open by defendant. *Idem*.....913

TAXATION—
1. County Auditor's Agent—Back Taxes—Commissions—Taxes on Distilled Spirits.—A county auditor's agent, whose duty is limited to collection of omitted taxes, was appointed under special authority to collect such of certain back taxes as to which the sheriff had been exonerated and such as were due the county separately from the State, for which the agent was to receive a certain commission. HELD, that he was not entitled to collect taxes due the county on distilled spirits in bonded warehouses, as Kentucky Statutes, 1899, sections 4105-4114, governing the collection of taxes on such spirits, make them payable to the officer entitled to receive the same, and by section 4129 the sheriff is the collector of county taxes if he has executed the proper bond. Shawhan v. Harrison County.....490
2. *De Facto* Collector.—An auditor's agent, in collecting taxes which

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TAXATION—Continued.

it was the sheriff's duty to collect, was, as to taxpayers, a *de facto* official acting under color of office, and the county could sue to compel him to pay over such tax without thereby admitting his authority to act. *Idem*.....490

3. Corporations—Situs of Personal Property.—Kentucky Statutes, 1899, section 4085, provides that the property of all corporations, except where differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, its chief officer shall give a full report of its property, etc. HELD, that where a corporation engaged in the grocery business, not within sections 4077, 4078, providing for the imposition of franchise taxes on certain corporations, owned stocks of goods in various counties, its entire personal property should be assessed at the place of its residence and principal place of business. Langdon-Creasy Co. v. Trustees Owenton School Dist.....562

4. Exemption—Place Used for Worship.—A Young Men's Christian Association, organized to endeavor to bring young men under moral and religious influences, and holding meetings every Sunday afternoon in a building owned by the association, where a service was had, hymns were sung, and the Scriptures were read and expounded, actually used its building for religious worship, within the meaning of Constitution, section 170, exempting property so used from taxation. Commonwealth v. Young Men's Christian Association. 711

5. Public Charity.—A Young Men's Christian Association, organized to endeavor to bring young men under moral and religious influences, to aid them in selecting suitable boarding places and securing employment, and by other means to surround them with Christian influences, and actually engaging in such work, and also furnishing instruction, keeping open libraries, gymnasiums, lists of boarding houses, etc., and membership in which is nontransferrable, giving no property right—the membership fee being merely nominal—is an institution of purely public charity, within Constitution, section 170, exempting property of such institutions from taxation. *Idem*. 711

6. Corporate Stock—Bailee—Pleading.—A railroad corporation is not a bailee in possession of its capital stock, within the meaning of Kentucky Statutes, 1899, section 4023, providing that the bailee in possession of property on a certain date shall be liable for taxes thereon; and an allegation, in proceedings by the sheriff to list such property, that the corporation is such a bailee, is a mere conclusion of law. Commonwealth v. C. & O. Ry. Co. 951

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TAXATION—Continued.

7. Situs—Assessment.—Kentucky Statutes, 1899, section 4058, requiring the taxpayer to list in his schedule the amount of stock in joint stock companies or associations of the State not paid in by the company or association, shows conclusively that stock in corporations is to be listed for assessment by the individual stockholder in the county in which he gives in his assessment, and not by the corporation. *Idem*.....951

TELEGRAPHS—

1. Messages—Delivery—Delay—Punitive Damages.—In an action for failure to deliver a telegram with reasonable despatch, in which plaintiff suffered no physical injury, defendant was not liable for punitive damages. Western Union Telegraph Co. v. Cross' Admr. 5
2. Negligence.—Where, on receipt of a telegraph message at its destination without street address or number of the addressee, it was at once delivered to a messenger, who spent all of the afternoon of the day in searching for information as to the addressee, without success, whereupon he returned the message to the office, and a service message was sent to the original station for more specific address, and on receipt of another telegram the message was delivered, the telegraph company was not guilty of gross negligence in delivering the message. *Idem*..5
3. Free Delivery Limits—Rules—Evidence.—Where a telegraph message was addressed to plaintiff's intestate, an obscure colored woman, living nearly a mile from the company's office, in a city of less than 5,000 inhabitants, without the street or number of her residence being given, and the sender of the message had not prepaid or guaranteed a delivery fee, it was error, in an action for delay in delivering the message, to exclude a rule of the company providing that messages would be delivered to persons residing more than a half mile from the company's office in cities of less than 5,000 inhabitants on the actual cost of delivery being prepaid or guaranteed. *Idem*..... 5
4. Negligence—Duty to Licensee.—Deceased took refuge from an electric storm under the porch of a store. He placed his back against an iron grating over a window, and was subsequently killed by lightning which struck one of defendant's telephone poles near the store and was conducted to the porch by a wire negligently maintained over the metal roof thereof, and from the roof to the iron grating, and then to deceased. HELD, that deceased was a bare licensee in the place where he was killed, and that defendant owed him no duty to properly maintain the wire. Cumberland Tel. & Tel. Co. v. Martin's Admr.....554

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TRUST ESTATES—

1. Creation—Express Trust—Construction—Spendthrift.—Plaintiff, who was a spendthrift, conveyed certain real estate to his father by absolute deed. As part of the same transaction, however, a bond was executed by the father, binding the obligors to pay plaintiff an annuity, and at his death to pay $7,000 to plaintiff's heirs. The intent of the proceedings was to divest plaintiff of the title to the property, but to preserve to him the beneficial use thereof during his life, and to secure the value of the remainder to his heirs at his death. HELD, that such deed and bond, when construed together, created an express trust for plaintiff's benefit. Anderson v. Kemper and Others.....339
2. Change in Habits—Termination of Trust.—Where, by certain conveyances, to which plaintiff was a party as grantor, his property was conveyed to trustees for his benefit for life, and thereafter to be divided among his heirs, the fact that by reason of a change in plaintiff's habits he thereafter became competent to manage his affairs, and desired to do so, was insufficient to authorize a termination of the trust. *Idem*.....339
3. Subsequent Instrument—Where land was conveyed for the benefit of the grantor for life, remainder to his heirs, a subsequent instrument, in so far as it purported to change the beneficiary in remainder, was invalid. *Idem*.....339
4. Annuity—Change.—Where a trust of certain lands provided that the grantor should receive an annuity of $500 per year, and on his death the property should go to his heirs, it was competent for such grantor during his life to change the annuity to one providing for the whole of the net income of the estate necessary for his support. *Idem*.....339
5. Trustees—Discharge—Grounds.—Where trustees have managed an estate, with strict fidelity and unusual ability, they will not be discharged because of mere strained relations between them and the *cestui que trust*, which were probably due to the cestui's own misconduct and misjudgment of the trustees. *Idem*....339
6. Advancements by Trustees.—Where trustees, by reason of an advancement of their personal funds, had become creditors of the trust, a judgment appropriating one-half of the net income to the repayment of such advancement, subject to the original trust to pay so much of the income as was necessary for the cestui's support, should be construed as only authorizing an appropriation to the trustees after a sufficient amount had been appropriated for the cestui's support. *Idem*.....339
7. Rights of *Cestui Que Trust*—Liability of Fund for Cestui's Debts.—A trust deed conveyed the residue of the trust fund to be invested by the trustee, and the net income paid in equal

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TRUST ESTAES—Continued.

monthly installmnts of fifty dollars each, and, in case the income did not amount to such sum, the principal should be liable therefor, to S., to be by him expended for the benefit of his children and family without liability to account therefor, and on his death the principal to pass in fee to his children, with power in S. to appoint same among his children by will, and, if S. should survive his present children, he might elect to demand and receive from the trustee the principal of the fund, provided that at any time after the previous life estate had been terminated, if S. affirmatively showed to the trustee that he was not indebted to any person, the income should be paid to him for his exclusive use and benefit. HELD, that such deed vested in S. the fee in the income and principal of the estate to the extent of fifty dollars per month, which amount was liable for his debts. Fidelity Trust & Safety Vault Co. v. Walker.....381

8. Charities—Validity.—A devise of all of testator's remaining estate after his wife's death, in perpetuity, for the purpose of educating the descendants of two persons named was not valid as a charitable use. Johnson v. De Pauw University.....672

9. Judgments—Res Judicata.—Where certain descendants of a testatrix brought suit for the benefit of themselves and all the other heirs and descendants of the beneficiaries of a trust created by the will, as authorized by Civil Code, section 25, to invalidate the trust and to recover the property embraced therein, in which they were defeated, and no appeal was taken, such judgment was *res judicata* as to the validity of the trust. *Idem.* 671

10. Laches—Estoppel.—Where beneficiaries of a testamentary trust brought suit to invalidate the same on behalf of themselves and all other beneficiaries, and no steps were taken by beneficiaris so represented, disapproving such action, for nearly thirteen years, they were estopped to object to such representation on the ground that no order of court was made allowing the plaintiffs in such action to prosecute for the benefit of all the beneficiaries. *Idem.* 671

TRUST FUNDS—

See Banks, &c., 8.

TRESPASSERS—

See Removal of Causes, 6; R. R., 16.

USURY—

See Bldg. & Loan Assn., 2.

VENDOR AND PURCHASER—

1. Sale of Mill Property—Fraud—Breach of Warranty—Rescission—

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VENDOR AND PURCHASER—Continued.

Compensation.—In an action by the purchasers of a mill against the seller on the ground of fraud in representations as to the condition of the mill, it appeared that plaintiffs discovered the fraud shortly after they took possession, but continued to use the property, and accepted a written promise from one of the sellers to repair the boiler and engine or furnish new ones; that the repairs were attempted to be made but were ineffectual, and that the engine was changed for another and other minor changes made in the mill, after which plaintiffs continued to run it for six months, defendants in the meantime having disposed of the property they had received for the mill at the price of $650 less than they had allowed plaintiffs for it. HELD, that it was error to allow rescission of the contract, but the plaintiff should have been awarded pecuniary compensation. Hogan, &c. v. Tucker &c. 918

VERDICT—

See Master, &c., 8; Automobiles, 4.

VESSEL—

See Admiralty, 3.

WAIVER—

See Bail Bonds, 2; Fire Ins., 4; Non-Residents, 5; R. R. 2.

WARRANTY—

See Sale if Personalty, 1, 2, 3; Contracts, 8.

WILLS—(See Husband and Wife, 5, 6, 7.)

1 Construction.—A testator, after making special bequests, bequeathed to his wife two-fifths of the income of the remainder during her life, to his son two-fifths thereof, and from the remaining one-fifth he directed that his executors should pay his sister $500 annually for her life, and that the balance of such one-fifth should be "allowed to accumulate for the benefit of" grandchildren, and directed that "such accumulation and such income" should be "equally divided and paid to and distributed among" the grandchildren when a designated grandchild should arrive at the age of thirty-five years, or would have been thirty-five had she lived. The testator made no further disposition of this one-fifth. HELD, to bequeath to the grandchildren, not only the income of this one-fifth, but also the principal thereof. Hussey v. Sargent, &c..... 53

2. Validity.—The validity of a will disposing of personal property only is determined by the law of the testator's domicile. *Idem*..53

3. Domicile of Testator—Rule against Perpetuities.—Under the laws of New Hampshire, the domicile of a testator disposing of per-

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WILLS—Continued.

sonalty only, the provision in his will directing that a certain portion of his estate shall be allowed to accumulate for the benefit of his grandchildren, and that such accumulation and income shall be equally divided among them when a designated grandchild, two years old at the date of testator's death, arrived at the age of thirty-five years, does not violate the rule against perpetuities, but the direction for accumulation will be enforced for a period of twenty-one years after the testator's death, and then the amount accumulated will be distributed among the grandchildren. *Idem*..... 53

4. Foreign Executor—Accounting—Jurisdiction.—Where an executor appointed in New Hampshire is domiciled in Kentucky and is in possession of the testator's property, none of which is in New Hampshire, the courts of Kentucky may require him to account to the persons entitled to the estate. *Idem*..... 53

5. Charitable Bequests—Beneficiaries—Certainty.—A will devising testator's property to her executor, to be by him distributed "to the poor in his discretion," is sufficiently definite, under Kentucky Statutes, 1899, section 317, requiring that gifts for such a purpose shall point out the purpose of the charity, and the beneficiaries thereof, with reasonable certainty. Thompson's Exr. v. Brown and Others.....102

6. Rights of Creditors.—Where a will directs the executor to sell the real and personal estate, and from the proceeds to pay the testator's debts and a sufficient amount to his widow for her support, and to distribute the remainder to his children, the children can not, by agreeing among themselves on a division of the real estate, instead of taking its proceeds, defeat the rights of the creditors to be paid before anything passes to the children. Hurst v. Davidson and Others.....351

7. Bona Fide Purchasers of Devised Estate.—Where a will directs the executor to sell the real estate, and distribute the proceeds, after making certain payments, between the children of the testator, the mere partition of the land by the children among themselves does not constitute them bona fide purchasers, within Kentucky Statutes, 1899, section 2087, providing that a devised estate, when sold, shall not be liable to the creditors of the testator in the hands of bona fide purchasers, unless action is instituted within six months after the estate is devised, *Idem*. 351

8. Sale of Land by Executor.—Kentucky Statutes, section 2087, which provides that a devised estate, when sold, shall not be liable to the creditors of the testator in the hands of a bona fide purchaser unless action is instituted within six months

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WILLS—Continued.

after the estate is devised, being intended to protect a devisee in the sale of what is devised, has no application where a will directs the executor to sell the real estate, and distribute the remainder of the proceeds, after the payment of debts and a sufficient amount to support the widow between the testator's children. *Idem.* 351

9. Lien of Creditor Under the Will.—Under Kentucky Statutes, 1899, section 2066, providing that when any property is devised subject to the payment by the devisee to another of a sum of money, the latter shall have a lien on the legacy for the sum to be paid, and section 467, providing that the word "legacy" includes either real or personal estate, the creditors of a testator, which directs by his will that his executor shall sell his real and personal estate, and from the proceeds to pay his debts, etc., and distribute the remainder between his children, have, on the recording of the will, a lien of record on the land for their debts. *Idem.* 351

10. Legacies—Ademption—Pleading.—The allegation of the answer, in an action for legacy, that a payment by testator after the date of the will was intended by him in satisfaction of the legacy is an allegation that it was so intended by him when it was made. Swinebroad v. Bright.....514

11. Transaction with Decedent.—The executor and his surety, in an action against him for a legacy, are not incompetent, under Civil Code, section 606, to testify to declarations of testator to show that a payment by him was intended in satisfaction of the legacy; they not being interested in the result, the controversy being really between such legatee and the residuary legatee. Not so, however, the legatee or her husband or the residing legatee. *Idem.* 514

12. Witness—Competency.—One interested in the result of the action may not testify to a transaction between him and deceased in the presence of another though such other testify for the other party in regard thereto. *Idem*.....514

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